ORIGINAL

No. 02-9065

Supreme Court, U.S.
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In the Supreme Court of the United States

Shakur Muhammad, aka John E. Mease,

Petitioner.

v

Mark Close,

Respondent.

On Petition For Writ Of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION AND APPENDIX

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COUNTER STATEMENT OF QUESTIONS PRESENTED

I. Should this Court grant certiorari to correct a harmless procedural error that did not affect the final outcome of this case and will have no precedential value for future cases?

II. Petitioner asserts that the Court of Appeals misapplied the "favorable termination" rule, which was set forth by this Court in *Heck v. Humphrey*, 512 U.S. 477 (1994). Should this Court grant certiorari when there are several other alternative grounds for affirming the district court's decision to dismiss Petitioner's action?

TABLE OF CONTENTS

INDEX OF AUTHORITIES iii

BASIS FOR JURISDICTION iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 4

I. Whether or not the Court of Appeals correctly decided the *Heck* issue is irrelevant because that issue was not dispositive of this case 4

II. The Court of Appeals correctly affirmed the District Court's decision to grant summary judgment because Petitioner failed to sufficiently support his claim. 9

CONCLUSION 11

APPENDIX

1. Magistrate Judge's Report and Recommendation, November 23, 1998 ..... 1a

2. District Court Order Adopting Magistrate Judge's Report and Recommendation, March 26, 1999 ..... 36a

3. Magistrate Judge's Report and Recommendation, August 15, 2001 ..... 47a

4. District Court Order Adopting Report and Recommendation, December 17, 2001 ..... 65a

5. District Court Judgment, December 17, 2001 ..... 71a

6. Court of Appeals Order Affirming District Court Judgment, September 23, 2002 ..... 72a

7. Court of Appeals Order Denying Rehearing, November 14, 2002 ..... 74a

INDEX OF AUTHORITIES

Cases
Edwards v. Balisok,
520 U.S. 641 (1997) 4, 7, 10

Huey v. Stine,
230 F.3d 226 (6th Cir. 2000) 5, 10

Spencer v. Kemna,
523 U.S. 1 (1998) 5

Thaddeus-X v. Blatter,
175 F.3d 378 (6th Cir. 1999) 9

United States National Bank of Oregon v. Independent Insurance Agents of America,
508 U.S. 439 (1993) 7

Statutes
28 U.S.C. § 1254(1) iv
28 U.S.C. § 1291 iv
28 U.S.C. § 1331 iv
42 U.S.C. § 1997e(a) 6

BASIS FOR JURISDICTION

This is a civil rights action brought under 42 U.S.C. § 1983. The district court had subject matter jurisdiction because Petitioner raised a federal question. 28 U.S.C. § 1331. The Court of Appeals had appellate jurisdiction because Petitioner appealed from a final decision of the district court, which granted summary judgment in favor of Respondent. 28 U.S.C. § 1291. This Court has jurisdiction to review the judgment of the Court of Appeals. 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This is a civil rights action brought *pro se* under 42 U.S.C. § 1983. Petitioner, who is a Michigan state prisoner, filed his complaint on June 2, 1998. Respondent is a corrections officer employed by the Michigan Department of Corrections. Petitioner claims that Respondent instigated a confrontation with him in the dining hall that resulted in Petitioner being found guilty of a major misconduct violation, albeit a lesser violation than the one charged by Respondent.[1] Petitioner claims that Respondent's actions were in retaliation against two previous lawsuits that Petitioner had filed against Respondent, along with several other MDOC employees. (App. p. 48a). The incident in the instant case occurred two and a half years after the first lawsuit was filed and nearly one and a half years after the second lawsuit. (App. p. 61a).

Respondent filed a motion to dismiss and/or for summary judgment on July 31, 1998. The magistrate judge recommended denying the motion. (App. p. 1a). The district court adopted the report and recommendation. (App. p. 46a). Petitioner then filed an amended complaint.

On October 19, 1999, the magistrate judge appointed pro bono counsel for Petitioner. Significant discovery then proceeded. On August 3, 2000, Respondent filed a motion to dismiss, which was based on failure to exhaust administrative remedies. The magistrate judge recommended denying the motion. The district court adopted the report and recommendation.

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[1] Petitioner was charged with "Threatening Behavior," which is defined as "words, actions or other behavior which expresses an intent to injure or physically abuse another person. Such misconduct includes attempted assault and battery." Michigan Department of Corrections Policy Directive 03.03.105, Attachment B, p. 1. The hearing officer found Petitioner guilty of "Insolence," which is defined as "words, actions, or other behavior which is intended to harass, degrade or cause alarm in an employee." *Id.*, at p. 3. Although both are considered major misconduct violations, only Threatening Behavior is "non-bondable," meaning that the prisoner immediately goes to administrative segregation pending the administrative hearing.

On February 6, 2001, which was after discovery had closed, Respondent filed a second motion for summary judgment. Respondent also filed a supplement to the motion. Petitioner filed a response and Respondent replied. The magistrate judge recommended granting Respondent's motion for summary judgment. The sole reason for the magistrate judge's recommendation was that Petitioner failed to come forward with sufficient evidence in support of his retaliation claim. In this report and recommendation, the magistrate judge made no recommendations regarding the issue in *Heck v. Humphrey*, 512 U.S. 1 (1998). (App. p. 47a). In *Heck*, this Court held that a § 1983 plaintiff cannot recover damages if such recovery would render a conviction invalid, unless the conviction had been set aside. Petitioner filed objections *pro se* because his counsel filed a motion to withdraw. The district court adopted the report and recommendation. As with the magistrate judge, the district judge's analysis focused solely on the fact that Petitioner failed to present sufficient evidence to support his retaliation claim. *Heck* was not mentioned in the opinion. (App. p. 65a).

Petitioner then filed a timely notice of appeal. On appeal, Petitioner argued that the district erred when it decided that Petitioner failed to set forth sufficient evidence in support of the causation element of his retaliation claim. Petitioner argued that there were disputed issues of material fact that should have precluded summary judgment. In his response brief, Respondent addressed the issue raised by Petitioner. In addition, Respondent asserted alternative grounds for affirming the district court's decision, including *Heck*.

On September 23, 2002, the Court of Appeals issued an unpublished order affirming the district court's decision. (App. p. 72a). The Court of Appeals declined to address whether the district court correctly decided that Respondent was entitled to summary judgment because Petitioner failed to come forward with sufficient evidence to support his claim. Rather, the Court

of Appeals affirmed on an alternative ground, namely, that the case fell directly within the doctrine of *Heck v. Humphrey* because Petitioner sought to have the misconduct charge expunged from his file.

Petitioner then filed a petition for rehearing. On November 14, 2002, the Court of Appeals denied the petition for rehearing. (App. p. 74a). On February 11, 2003, Petitioner filed a timely petition for a writ of certiorari. After Respondent filed a waiver form, the Clerk of the Court requested Respondent to file a response.

REASONS FOR DENYING THE PETITION

I. Whether or not the Court of Appeals correctly decided the *Heck* issue is irrelevant because that issue was not dispositive of this case.

Petitioner's first question presented asserts that the Court of Appeals misconstrued the relief sought (i.e., whether Petitioner sought to have his misconduct violation expunged). Petitioner's second question presented asserts that the Court of Appeals misapplied the *Heck* analysis. These two questions are interrelated and will therefore be addressed together.

The procedural waters of this case are somewhat murky. In his original complaint, Petitioner sought to have the misconduct charge expunged from his file. But Petitioner later filed an amended complaint, which sought damages only. In its analysis, the Court of Appeals focused on the relief sought in the original complaint. Because it determined that Petitioner was seeking to have the misconduct charge expunged from his file, the Court of Appeals held that Petitioner's action was barred by *Heck v. Humphrey, supra*, 512 U.S. at 486-87, where this Court held:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.

The doctrine in *Heck*, known as the "favorable termination" rule, was applied to prison disciplinary proceedings in *Edwards v. Balisok*, 520 U.S. 641 (1997).

The main issue presented by Petitioner is whether the favorable termination rule should apply when a prisoner is no longer in custody. In his petition for a writ of certiorari, Petitioner asserts that "[t]here is clear conflict in the circuit courts regarding the application of the *Heck* rule after *Spencer* [*v. Kemna*, 523 U.S. 1 (1998)] and Petitioner believes it imperative that this

Court decide this issue." (Petitioner's brief, p. 10). While there may be some merit to Petitioner's assertion that there is disagreement among the circuits, granting certiorari in the instant case would not resolve the issue. As discussed more fully in the next section, the instant case was resolved on summary judgment. In other words, the district court dismissed Petitioner's action because Petitioner could not factually support his claim. *Heck* had nothing to do with the district court's decision. The procedural posture of this case was somewhat confused as the result of the Court of Appeals using *Heck* as an alternative ground for affirming the district court's decision. The Court of Appeals did not hold that the district court erroneously granted summary judgment. Rather, the Court of Appeals simply chose not to address this fact-intensive issue.

Further complicating the instant case is that the main issue presented in the Petition was not addressed by the district court, namely, that *Heck* was misapplied by the Court of Appeals in *Huey v. Stine*, 230 F.3d 226 (6th Cir. 2000). Respondent raised the *Heck* issue in his first motion for summary judgment, which was denied by the district court. In its first report and recommendation, the magistrate judge did a detailed analysis of the *Heck* issue. (App. pp. 23a-29a). In fact, the magistrate judge recommended that *Heck* did not apply because Petitioner was no longer "in custody." The magistrate judge based this conclusion on its interpretation of *Spencer v. Kemna*, 523 U.S. 1 (1998).

After the first report and recommendation was adopted by the district court, the Court of Appeals issued its *Huey* decision. In *Huey*, the Court of Appeals held "that *Heck* is not made inapplicable to [the plaintiff's] claim by the unavailability of habeas relief." *Huey*, 230 F.3d at 230. The *Huey* court determined, even in light of *Spencer*, that the favorable termination rule applies even if a prisoner is no longer in custody. This was contrary to the conclusion reached

previously by the magistrate judge in the instant case. The magistrate judge and district court never analyzed Petitioner's claims under the new law announced by *Huey*, however, because the basis for the district court's final decision in the instant case was simply that Petitioner failed to sufficiently support his retaliation claim. In other words, the issue regarding whether *Heck* applies to a prisoner who is no longer in custody was never fully developed below. The incomplete and messy procedural posture of the instant case makes it a poor candidate for certiorari review.

In short, the ultimate resolution of this case rested on basic summary judgment principles, not *Heck*. And this was not the only available ground for dismissing Petitioner's action. For example, because the district court decided the instant case on the merits, it did not make a decision on Respondent's claim of qualified immunity, which could have also been a reason for dismissing Petitioner's action. The qualified immunity issue would have also been completely independent from the *Heck* issue. Yet another issue is whether Petitioner properly exhausted his claim as required by 42 U.S.C. § 1997e(a). Again, these alternative grounds for dismissing Petitioner's action show that the accuracy of the Court of Appeals' analysis of the *Heck* issue does not affect the ultimate resolution of this case.

Even if this Court were to make a ruling on the *Heck* issue that departs from the Sixth Circuit's view that *Heck* applies even when a prisoner is no longer in custody, the result of the instant case would not change because there were several other grounds for dismissing Petitioner's action, including the ground relied upon by the district court, which was that Petitioner failed to factually support his claim. If this Court's decision on the *Heck* issue were to have any impact on the instant case, then this Court would have to wade through the procedural

and factual morass of the instant case and determine that the numerous alternative grounds did not support dismissing Petitioner's action.

Finally, Petitioner actually *is* still in custody. Although Petitioner is no longer in administrative segregation, he is still serving time in prison. Moreover, Petitioner's conviction of the Insolence major misconduct ticket resulted in a loss of good time credits. In other words, Petitioner is serving a longer sentence as a result of his misconduct conviction. Because the major misconduct ticket resulted in an increase in his sentence, Petitioner should be considered "in custody" until he is released from prison, not just when he is released from administrative segregation. Because Petitioner did not get his conviction reversed on direct appeal or otherwise set aside, the instant lawsuit does, in fact, affect the length of Petitioner's sentence. Petitioner could have appealed his misconduct conviction even after he was released from administrative segregation. Habeas-type relief was therefore not foreclosed merely because Petitioner was released from administrative segregation. Petitioner is claiming that he would not have been found guilty had Respondent not "set him up" by allegedly instigating a confrontation. Thus, success on Petitioner's claim would imply the invalidity of the major misconduct conviction, which is barred by *Heck* and *Edwards, supra*.

In sum, the instant case would be an exceedingly poor candidate for deciding the issue of whether *Heck* applies when a prisoner is no longer in custody. First, there were alternative grounds for dismissing Petitioner's action. Because the *Heck* analysis was not even necessary for the district court's decision, a ruling by this Court on the issue would essentially be an advisory opinion. Federal courts, however, lack the power to issue advisory opinions. *United States National Bank of Oregon v. Independent Insurance Agents of America*, 508 U.S. 439, 446 (1993). Second, Petitioner was in custody and remains in custody. Consequently, Petitioner was

not barred from seeking review of his misconduct conviction merely because he had already been released from administrative segregation. Thus, the petition for a writ of certiorari should be denied.

II. The Court of Appeals correctly affirmed the District Court's decision to grant summary judgment because Petitioner failed to sufficiently support his claim.

As discussed above, the instant case was decided by the district court without considering the *Heck* issue. This is manifestly evident since the Petitioner essentially asks this Court to correct an alleged error regarding the granting of summary judgment. It is not, however, the role of this Court to simply correct errors of the lower courts. Moreover, even if this Court chose to correct errors in individual cases, this case is not a good candidate for such review because the district court correctly granted summary judgment and the Court of Appeals correctly affirmed.

The disposition of this case at the district court level was based on retaliation law in the Sixth Circuit. Prisoner claims alleging First Amendment retaliation are analyzed under the *en banc* court's decision in *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999). In *Thaddeus-X*, the Court of Appeals held that: (1) the plaintiff was engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two–that is, the adverse action was motivated at least in part by the plaintiff's protected conduct. *Id.* at 394.

The magistrate judge's second report and recommendation focused on the second and third prongs of the *Thaddeus-X* test. Regarding the adverse action prong, the magistrate judge concluded that the evidence was entirely one-sided in favor of Respondent. (App. pp. 58a-59a). Petitioner failed to present sufficient evidence in support of his allegation that Respondent instigated an incident, then filed a trumped-up misconduct charge. Regarding the causation prong, the magistrate judge concluded that the protected conduct (filing lawsuits) occurred too long before the alleged adverse action to support an inference of causation. (App. p. 61a).

Although the district court did not disagree with the magistrate judge on the adverse action prong, the district court found that Respondent's arguments against the causation prong were much stronger, and therefore dispositive of the case. (App. p. 69a). In short, the district court concluded that temporal proximity was not sufficient to establish causation and that there was a lack of affirmative evidence to support Petitioner's claim.

Missing from both the magistrate judge's second report and recommendation and the district court's opinion was any mention of *Heck v. Humphrey*, *Edwards v. Balisok*, or *Huey v. Stine*, or any discussion whatsoever about the favorable termination rule. Such a discussion was simply not necessary because the claims could be dismissed on the merits. In other words, this was a straightforward application of basic summary judgment principles, as guided by the First Amendment retaliation law of the Sixth Circuit. In sum, the correct result was reached by the lower courts in the instant case, regardless of whether *Heck* applies when a prisoner is no longer in custody.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: May, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SHAKUR MUHAMMAD, #213302,
aka John E. Mease,

Plaintiff,

v.

MARK CLOSE,

Defendant.

CIVIL ACTION
NO. 98-CV-10153-BC

DISTRICT JUDGE ROBERT H. CLELAND
MAGISTRATE JUDGE CHARLES BINDER

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON DEFENDANT'S RULE 12(b) MOTION FOR DISMISSAL AND RULE 56(b) MOTION FOR SUMMARY JUDGMENT (Dkt. 9), **AND PLAINTIFF'S MOTION TO AMEND COMPLAINT** (Dkt. 15.)

I. RECOMMENDATIONS

For the reasons set forth below, **IT IS RECOMMENDED** that Plaintiffs Motion to Amend Complaint be **GRANTED.**

After review and consideration of the pleadings, I conclude that: (1) the Plaintiff has stated a cause of action alleging the violation of rights protected by the United States Constitution; (2) the Defendant is not entitled to qualified immunity; and (3) the Plaintiff's claim is not barred by United States Supreme Court precedent. Accordingly, **IT IS RECOMMENDED** that the prayer for dismissal contained in Defendant's motion be **DENIED.**

After review and consideration of the entire record presently before the Court, I conclude that there are disputed material issues of fact relating to Defendant's intent at the time he issued misconduct charges against Plaintiff, and that Defendant is not entitled to qualified immunity. Accordingly, **IT IS RECOMMENDED** that the prayer for summary judgment contained in Defendant's motion **BE DENIED.**

II. REPORT

A. INTRODUCTION and FACTS

Pending, pursuant to an Order of Reference from United States District Judge Robert Cleland, (Dkt. 6), is Defendant Close's Rule 12(b) Motion for Dismissal and Rule 56(b) Motion for Summary Judgment. (Dkt. 9). Plaintiff filed a Motion in Opposition to Defendant's Motion for Dismissal/Summary Judgment. (Dkt. 16). Also pending is Plaintiffs Motion to Amend the Complaint. (Dkt. 15). Upon review of the pleadings, I conclude that pursuant to E.D. Mich. LR 7.1(e)(2), this motion is ready for Report and Recommendation without oral argument.

Plaintiff filed this prisoner civil rights complaint under 42 U.S.C. § 1983, claiming that "Defendant framed Plaintiff in retaliation for the Plaintiff's exercise of his First Amendment rights." (Compl., Dkt. 3 at 4B). The incident occurred on May 21, 1997, while Plaintiff was incarcerated in general population at Standish Maximum Facility ("SMF"). Plaintiff alleges that Defendant Close, a corrections officer employed by SMF, instigated an incident with Plaintiff, and then wrote Plaintiff up for misconduct arising out

of the incident, all with the intent of retaliating against Plaintiff for filing two previous civil rights lawsuits against the Defendant and others, as well as for filing SMF grievances against the Defendant. At the time of the incident, an appeal was pending with the Sixth Circuit in one of those §1983 cases.[1]

Regarding the incident in question, Plaintiff alleges that while he was eating breakfast in the dining area, he noticed Defendant Close staring at him. Plaintiff continued to eat, but when he looked up again, Defendant was still staring. At this time, Plaintiff began to stare back. Plaintiff alleges that Defendant then "made a fighting stance" towards him. (Compl., Dkt. 3 at 4A). Plaintiff turned away to drink his coffee, and then noticed that Defendant was "coming into the dining area at a fast pace with his face contorted." (*Id.*) Plaintiff, feeling threatened by Defendant's body language and fast approach, stood up and walked towards the Defendant. Plaintiff alleges that when "Defendant and Plaintiff came within a foot of one another, Defendant stated, 'What's up,' while staring angerly [sic] at Plaintiff. Plaintiff did not respond." Plaintiff was then handcuffed by two other officers and taken to a detention cell. (*Id.*)

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[1] Plaintiff filed a Prisoner Civil Rights case in this court against 14 defendants, including Defendant Close, in 1994 (Case No. 94-CV-7493-DT). Summary judgment for defendants was granted by U.S. District Judge Anna Diggs Taylor on August 18, 1995, and the appeals court dismissed Plaintiff's appeal for want of prosecution in March of 1996. In February, 1996, Plaintiff filed another Prisoner Civil Rights case against five defendants, including Defendant Close (Case No. 96-CV-100053-BC). Judgment was entered for defendants by U.S. District Judge Robert H. Cleland on December 24, 1996, and Plaintiff filed an appeal with the Sixth Circuit Court of Appeals in February of 1997. The appeals court affirmed the decision of the district court on February 9, 1998.

Following this incident, Defendant Officer Close filed a Major Misconduct Report charging Plaintiff with the major rule violation of "Threatening Behavior."[2] Defendant described the confrontation in his report:

> At 0744 while watching 3 block chowlines, I made direct eye contact with prisoner Mease-X []. Mease-X contorted his face and made a statement that I believe was directed at me but I could not understand him over the room noise. I then walked into the chow hall to speak with Mease, I then noticed Mease-X was angerly [sic] walking towards me and looked very hostile, I Immediately stopped. Mease kept walking and stopped approximatly [sic] 2 inches from my face, starring [sic] directly into my eyes and breathing heavily on my face. This officer was in fear of being physically assulted [sic] and or injured. Mease's face was contorted with veins buldging [sic] at his temples. At this point Officer Metevia immediatly [sic] handcuffed Mease-X and escorted him to unit Z.

(Pl.'s Exhibits, Dkt. 14, Ex. A at 2). The Report also stated that Plaintiff Mease's "Status Pending Hearing" was "Non-Bond List," and stated that "prisoner was placed on (illegible)[3] because of above misconduct." (*Id.*)

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[2] "Threatening Behavior" is a major rule violation defined as: "Words, actions or other behavior which expresses a intent to injure or physically abuse another person. Such misconduct includes attempted assault and battery." MDOC P.D. 03.03.105, Attachment B at 2. It is a "[m]andatory 'nonbondable' charge." *Id.* at 1. The Policy Directive lists the following as common examples of Threatening Behavior: "Threats of sexual assault made by one prisoner to another prisoner; writing threatening letters to another person; threats made to a third person which are intended to place the person threatened in fear of harm." *Id.* at 2.

[3] I believe that the report states that Plaintiff was placed on "T-Lock," which would be short for "toplock." This would be consistent with the MDOC's policy directive stating that "the reviewing officer shall order the prisoner to be confined in segregation or on toplock pending a formal hearing if the charge is nonbondable . . . ." MDOC P. D. 03.03.105(J)(5). Toplock means that a prisoner is restricted to his own cell, room or bunk and bunk area. He "shall not leave his cell, room or bunk area for any reason without specific authorization from the appropriate staff person." MDOC P.D. 03.03.105(X)(2).

Six days after the incident, a Major Misconduct Hearing was held. Plaintiff was found not guilty of Threatening Behavior. (*Id.* at 1.) After reading witness statements from both inmates and officers, the hearing officer reduced the charge to Insolence.[4] Plaintiff was found guilty of Insolence. Plaintiff was given the disciplinary sanctions of seven days detention and thirty days loss of privileges for the violation. (*Id.*)

Plaintiff states that he "suffered physically as he was subjected to 43 days of unjust loss of his liberty and . . . suffers mental and emotion [sic] anguish as a result of Defendant's threatening conduct and retaliatory disciplinary punishment." (Compl., Dkt. 3 at 4B). He requests relief in the form of: (1) $4,300 in compensatory damages; (2) $5,000 in punitive damages for physical and mental injuries; and (3) his record expunged of the misconduct charge because "Defendant used the prison disciplinary process to retaliate." (*Id.* at 4.)

Defendant Close filed the instant motion, (Def.'s Mot., Dkt. 9), arguing that the complaint must be dismissed because *Edwards v. Balisok*, 520 U.S. 641, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997), bars Plaintiff's § 1983 claim. Alternatively, Defendant argues that the finding of guilt on the misconduct charge defeats Plaintiffs claim that the ticket

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[4] "Insolence" is also classified as a major rule violation. Its definition is: "Words, actions, or other behavior which is intended to harass, or cause alarm in an employee." *Id.* at 3. It is not, however, a mandatory nonbondable charge. Common examples of Insolence are: "Abusive language, writing or gesture directed at an employee." *Id.*

was retaliatory and an abuse of authority. Finally, Defendant asserts that he is entitled to qualified immunity. An affidavit by Defendant Close is included with the motion.

Plaintiff filed a Motion in Opposition to Defendant's Motion for Dismissal/Summary Judgment, (Pl.'s Response, Dkt. 16), disputing each of the three legal arguments made by Defendant. In addition, Plaintiff argues that summary judgment should not be granted because Plaintiff has not had the opportunity to pursue discovery. *(Id.* at 16.) Plaintiff's response also includes an affidavit by Plaintiff Muhammad.

On the same day that Plaintiff filed his Response, he also filed a Motion and Affidavit to Amend Plaintiff's § 1983 Complaint. (Pl.'s Mot. to Amend, Dkt. 15). Plaintiff seeks to amend two paragraphs of his complaint. The Defendant did not file a response to Plaintiff's Motion to Amend.

B. ANALYSIS AND CONCLUSIONS

1. Plaintiff's Motion to Amend Complaint

Rule 15 of the Federal Rules of Civil Procedure governs amendments of pleadings. It reads:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

FED. R. CIV. P. 15(a).

In this case, Defendant had responded to Plaintiff's original complaint prior to the filing of the motion to amend, so the applicable standard is that leave to amend the complaint shall be "freely" granted if "justice so requires."

Plaintiff seeks to amend the portion of his complaint which states that he was subjected to 43 days of unjust loss of his liberty" (quoted more fully above) to read that he". .was subjected to 7 days of unjust loss of his liberty . . . ." (Pl's Mot. to Amend, Dkt. 15 at 1). He further moves to amend the section on relief. Instead of requesting that his record be expunged and specifying a separate dollar amount for compensatory and punitive damages, he moves to request relief as follows: "Plaintiff requests $10,000.00 in compensatory and punitive damages for the physical and emotional injuries sustained as a result of defendant's retaliatory conduct." *(Id.* at 2.)

Plaintiff states that the two changes he requests "will not in any way prejudice the defendant or effect any of the defenses alleged by the defendant. The . . . amendments only seek to more accurately state the relief sought by plaintiff in his § 1983 complaint and will be in the interest of a just and sound judicial process." (*Id.*) He further "attests that the errors made in his § 1983 complaint arose from his lack of experience in the legal articulation of the relief he seeks for the violation of his constitutional rights by the defendant." (*Id.*)

Defendants did not file a response to Plaintiff's Motion to Amend. L.C.R. 7.1(d)(2)(B) states that "[a] response to a nondispositive motion must be filed within 14 days after service of the motion."

It is my assumption that Plaintiff's desire to change "43 days loss of liberty" to only "7 days" is an effort to correct a mischaracterization of the 30 days loss of privileges he received, as a "loss of liberty." His other proposed amendment is a change to the relief he is requesting. Since Plaintiff is not seeking to add or change any factual allegations, and considering that Defendant has not registered any opposition to the Motion to Amend, I conclude that the Defendant would not be prejudiced by this Court's allowing the Plaintiff to amend his Complaint. Moreover, a *pro se* litigants' pleadings are to be held to a less stringent standard than pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972); *Brooks v. Seiter*, 779 F.2d 1177, 1180 (6th Cir. 1985).

I therefore suggest that the Motion to Amend be granted.

2. Defendant's Motion to Dismiss or for Summary Judgment

a. Motion Standards

Defendant moves for dismissal pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim, or for summary judgment under Fed. R. Civ. P. 56(c). When deciding a motion to dismiss for failure to state a claim under 12(b)(6), "[t]he court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." *Cline v. Rogers*, 87 F.3d 176 (6th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 510, 136 L. Ed. 2d 400 (1996)(citing *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993)). "While this standard is decidedly

liberal, it requires more than the bare assertion of legal conclusions." *DeLorean*, 991 F.2d at 1240 (citing *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988)). However, *pro se* litigants' pleadings are held to a less stringent standard than pleadings drafted by lawyers. *Brooks v. Seiter*, 779 F.2d 1177, 1180 (6th Cir. 1985).

Defendant's motion also included a prayer for summary judgment. A motion for summary judgment will be granted under Fed. R. Civ. P. 56(c) where there is no genuine issue of material facts, and the moving party is entitled to judgment as a matter of law. All facts and inferences must be viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-movant's case. *Street v. J. C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989)(citing *Celotex Corp. v Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). The moving party thus bears a considerable burden. The Court of Appeals for the Sixth Circuit has held that a

> District Court may grant a motion for summary judgment only if it finds from the whole record before it that there are no material facts which are in dispute. It may not make findings of disputed facts on a motion for summary judgment. The movant has the burden of showing conclusively that there exists no genuine issue as to a material fact and that the evidence together with all inferences to be drawn therefrom must be considered in the light most favorable to the party opposing the motion. The movant's papers are to be closely scrutinized while those of the opponent are to be viewed indulgently.

Watkins v. Northwestern Ohio Tractor Pullers Assn., 630 F.2d 1155, 1158 (6th Cir. 1980) (citations omitted). *See also, Ghandi v. Police Dept. of Detroit*, 747 F.2d 338 (6th Cir. 1984).

Summary judgment is proper when the moving party shows that the non-moving party, after sufficient discovery, is unable to meet its burden of proof. *Celotex*, 477 U.S. at 326. However, to defeat the motion, the non-moving party cannot rest merely on the pleadings alone. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505. 191 L. Ed. 2d 202 (1986). It is the plaintiff's obligation to present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Celotex*, 477 U.S. at 324. Not every issue of fact or conflicting inference presents a genuine issue of material fact requiring the denial of summary judgment. "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson*, 477 U.S. at 247-48 (1986). Irrelevant and unnecessary facts should have no bearing on a trial court's determination on a motion for summary judgment. *Id.* at 248. Accordingly, only germane facts that go to the heart of the party's suit deserve consideration. The courts will not entertain metaphysical doubts as material facts to defeat the motion. *Matsushita*, 475 U.S. at 586.

As a general rule, "[p]rison administrators should be accorded wide-ranging deference in the adoption and execution of policy and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). "As long

as the conditions or degree of confinement to which the prisoner is subjected are within the sentence imposed upon him and are not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." *Montanye v. Haymes*, 427 U.S. 236, 96 S. Ct. 2543, 49 L. Ed. 2d 466 (1976).

b. Motion to Dismiss

Two of Defendant's three claims are appropriately considered under the dismissal standard: whether Defendant is entitled to qualified immunity and whether Plaintiffs claim is barred by *Heck* and *Balisok*. The Sixth Circuit has recently stated that before a court can consider whether a defendant is entitled to qualified immunity, it "must first examine whether the [plaintiff] ha[s] properly alleged a cause of action." *Block v. Ribar*, 156 F.3d 673, 678, 683 (6th Cir. 1998)("Because the proper order of consideration begins with the determination of whether a violation of a constitutional right occurred, and then proceeds to a consideration of the defense, we will begin our analysis with the former, then discuss [the] defense of qualified immunity."). I therefore will consider whether Plaintiff has properly alleged a cause of action for retaliation prior to discussing the defense of qualified immunity.

i. Cause of Action for Retaliation

Plaintiff brings his retaliation action under 42 U.S.C. § 1983. The essential elements of a § 1983 claim are that the conduct complained of (1) was committed by a person acting under color of state law and (2) deprived the plaintiff of rights, privileges,

and immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor, 451* U.S. 527, 535, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), *overruled on other grounds by Daniels v. Williams,* 474 U.S. 327, 106 S. Ct. 677, 88 L. Ed. 2d 662 (1986). Absent either element, a § 1983 claim will not lie. *Christy v. Randlett,* 932 F.2d 502, 504 (6th Cir. 1991). It is not disputed that Defendant Close was acting under the color of state law as a corrections officer when the incident took place and the misconduct report was filed, therefore the first element is met. Regarding the second element, Plaintiff asserts that his constitutional rights were violated by Defendant when Defendant allegedly retaliated against him for filing previous lawsuits and grievances.

When a prison official retaliates against a prisoner for exercising his First Amendment rights to file a lawsuit or a grievance, it can be a violation of the substantive due process rights of the prisoner. *See Jackson-El v. Winsor,* 986 F. Supp. 440 (E.D. Mich. 1997); *Cale v. Johnson,* 861 F.2d 943 (6th Cir. 1988). In order to prevail on a claim of retaliation, plaintiff must show that retaliation was a substantial or motivating factor in defendant's conduct. *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977).

In 1988, the Sixth Circuit reviewed a case where the plaintiff prisoner alleged that correction officers had framed him and then filed disciplinary charges against him in retaliation for exercise of his First Amendment rights. In *Cale v. Johnson,* 861 F.2d 943 (6th Cir. 1988), the court tackled the issue of what standard to apply to determine whether defendant's conduct rose to the level of a due process violation. The court began by

quoting the general principle that the "'[t]est for substantive due process claims is whether defendants' conduct "shocks the conscience."'" *Id.* at 949 (quoting *McMaster v. Cabinet for Human Resources,* 824 F.2d 518 (6th Cir. 1987)(quoting *Rochin v. California,* 342 U.S. 165 (1952))). The court went on to recognize that in at least one case, "however, this court has recognized that an 'egregious abuse of governmental power' may be sufficient to state a claim based on the violation of substantive due process.'" *Id.* (citing *Vinson v. Campbell County Fiscal Ct.,* 820 F.2d 194, 201 (6th Cir. 1987)). The *Cale* court, in reversing the district court's grant of summary judgment for defendants, did not apply the "shocks the conscience" standard when it concluded that

> the evidence supports a claim that [defendant] intentionally and maliciously framed [plaintiff] Cale and filed disciplinary charges against him in retaliation for Cale's exercise of his first amendment rights. This alleged conduct constitutes an egregious abuse of authority within the meaning of *Vinson.*

Id. at 950 (emphasis added).

In 1995, Judge Hood considered the legal standards to be applied in a retaliation action. In *Riley v. Kurtz,* 893 F. Supp. 709, 716 (ED. Mich. 1995), she stated that cases holding that "the means of retaliation must be an 'egregious abuse of government power' or 'shock the conscience'" are wrong. Instead, the court found that "[w]illful violations of enumerated constitutional guarantees are constitutional torts, and nothing more need be shown. . . . It is only when dealing with one of the unenumerated portions of substantive due process that some plus factor, such as 'shocks the conscience,' is required to define the conduct as a constitutional tort." *Id.* at 717-18.

In June of 1997, the Sixth Circuit decided another retaliation case. In *McLaurin v. Cole*, 115 F.3d 408 (6th Cir. 1997), a prisoner plaintiff appealed a district court's judgment as a matter of law for defendant, a corrections officer, following the plaintiff's proofs at trial. The Sixth Circuit stated: "Though McLaurin argues that the facts alleged need not be shocking to the conscience because his claim is grounded on first amendment principles, **this court has repeatedly demanded that retaliation claims arising from the exercise of First Amendment rights be shocking to the conscience."** *Id.* at 410 (footnote omitted)(emphasis added). Interestingly, the *McLaurin* court then cited five cases as support for that statement. The first case it cited was *Cale v. Johnson*, discussed *supra*, which mentioned the "shocks the conscience" test, but actually used the "egregious abuse of governmental power" test in its decision. The other four cases cited are all unpublished opinions. Of those four, only two mentioned the "shocks the conscience" test, and one of those two used an either/or approach ("plaintiff has not shown that the defendants' conduct constitutes an egregious abuse of governmental power or that such action otherwise shocks the conscience"). *Id.* at 410-11.

The *McLaurin* court went on to affirm the district judge's grant of judgment as a matter of law because the plaintiff had not proven that the misconduct report defendant wrote against him was motivated by a desire to retaliate, and additionally because the defendant's actions were not shocking to the conscience. *Id.* at 411.

Circuit Judge Ryan wrote a concurring opinion in *McLaurin*, essentially agreeing with Judge Hood's reasoning in *Riley*. He first explained that there are two types of substantive due process:

> [A]s this court has . . . held, there are two distinct categories of substantive due process rights, and only one of them implicates the "shocks the conscience standard:
>
> > Substantive due process claims are of two types. The first type includes claims asserting denial of a right, privilege, or immunity secured by the constitution or by federal statute other than procedural claims under "the Fourteenth Amendment simpliciter."
> >
> > The other type of claim is directed at official acts which may not occur regardless of the procedural safeguards accompanying them. The test for substantive due process claims of this type is whether the conduct complained of "shocks of the conscience" of the court.

Id. at 412 (quoting *Mertik v. Blalock*, 983 F.2d 1353, 1367 (6th Cir. 1993)). Judge Ryan explained that the

> important analytical difference between the two varieties of substantive due process claims should amply illustrate why the "shocks the conscience" standard is not appropriately applied in the type of claim implicated here. The "shocks the conscience" standard developed as a safeguard against frivolous substantive due process claims of this ill-defined, non-enumerated, generalized variety. Only this category of generalized substantive due process claims not rooted in any specific enumerated provision of the Bill of Rights need meet the "shocks the conscience" standard in order to survive dismissal.
>
> And the logic of this is apparent. **If a plaintiff has adequately alleged a willful violation of, for example, the First Amendment, it simply makes no sense for the court to require further that the particular unconstitutional action in question be one that is shocking to the conscience of the court.**

Id. at 412 (emphasis added). Finally, Judge Ryan discussed the majority opinion:

> The majority declares that *Cale v. Johnson* supports the application of the shock-the-conscience test, but this is incorrect. First, *Cale* **does not hold that the shocks-the-conscience test is the appropriate standard for that case; it simply mentions that standard in passing,** as a dictum. But second, and more importantly, *Cale* is not a "retaliation" case in the sense that this case is a retaliation case. The plaintiff's claims in *Cale* were founded on the second type of substantive due process . . . . There was no suggestion that the guard's action in *Cale* was taken in retaliation for the plaintiff's attempt to gain access to the courts or utilize the administrative grievance process, or any other exercise of a First Amendment right. **I know of no published authority from this court relying on Cale for the proposition that the shocks-the-conscience standard is appropriately applied in First Amendment retaliation claims;** the majority's reliance on unpublished case law may be interesting as an academic matter, but those cases simply do not have the weight of authority.

Id. at 412-13 (citations and footnotes omitted)(emphasis added). Judge Ryan concluded by agreeing with the outcome of the majority's opinion, however, because he too believed that plaintiff had not presented any evidence to suggest the misconduct ticket was motivated by a desire to retaliate. *Id.* at 413.

In this case, I suggest that the correct standard to be applied to determine if Defendant's alleged conduct rose to the level of a violation, and therefore whether Plaintiff has adequately pleaded a cause of action, is whether the conduct "shocks the consciences of the court. Although the reasoning of Judge Hood and Judge Ryan is compelling, the fact remains that binding Sixth Circuit precedent requires the "shocks the conscience" standard to be applied. *See McLaurin v. Cole,* 115 F.3d 408, 410 (6th Cir. 1997). I further suggest that "framing" a prisoner in retaliation for the exercise of his First Amendment rights is a severe abuse of governmental power which is shocking to the conscience. *See Jackson-El v. Winsor,* 986 F. Supp. 440, 443-44 (E.D. Mich. 1997).

Plaintiff has alleged that Defendant provoked the incident and charged Plaintiff with an inflated violation with the intention of retaliating against Plaintiff for his exercising his constitutional rights. I suggest that this alleged conduct "shocks the conscience" of the court, and therefore Plaintiff has stated a cognizable claim of retaliation. Dismissal pursuant to Rule 12(b)(6) is therefore inappropriate unless the Defendant is entitled to qualified immunity or the claim is barred by *Heck* and *Balisok.*

ii. Qualified Immunity

The Defendant asserts that he is entitled to qualified immunity. The Supreme Court defined the doctrine by stating that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). The Sixth Circuit recently discussed the "sometimes confusing doctrine" of qualified immunity:

> The confusion in this area is generated in part by carrying over an absolute immunity construct into a qualified immunity analysis. When an official is cloaked with absolute immunity, it matters not what he did, when he did it or what the state of the law was then and now. Such is not the case with qualified immunity.

Kain v. Nesbia, 156 F.3d 669, 672 n.5 (6th Cir. 1998). The court there explained:

> When making a qualified immunity analysis, it is important to remember that the defendant is, in essence, saying: "If the plaintiff's version is credited, what I did, judged today, arguendo would be wrongful, but at the time I acted, no reasonable officer would have known he was acting wrongfully." *See Berryman v. Rieger,* 150 F.3d 561, 562 (6th Cir. 1998) ("the defendant must be prepared to overlook any factual dispute and to concede an interpretation of the facts in the light most favorable to the

> plaintiff's case"). If an officer committed no wrong, then qualified immunity is not implicated.

Kain, 156 F.3d at 671-72.

The Sixth Circuit has also held that there is a "heightened pleading" requirement in cases where the defendant claims qualified immunity. In *Veney v. Hogan*, 70 F.3d 917 (6th Cir. 1995), the court held that a plaintiff must respond to a defense of qualified immunity with "specific, non-conclusory allegations of fact that will enable the district court to determine that those facts, if proved, will overcome the defense of qualified immunity." *Id.* at 922. The court reasoned that it can be argued that this "heightened" standard is not really a departure from Rule 8[5] of the Federal Rules of Civil Procedure at all, but rather is exactly what the drafters of the rule envisioned. *Id.* at 921-22. The court also explained that if the defense of qualified immunity is "raised by the individual defendant by a motion for summary judgment, it would follow that the burden by the plaintiff would be a heightened production of summary judgment documentation under Rule 56." *Id.* at 922, n.5. The *Veney* court found that the plaintiff in that case did not meet the heightened standard because he

> fail[ed] to indicate the precise content and form of the complaints and challenges, the context in which they were made, and when and to whom they were made. Furthermore, . . . the complaint does not allege wrongdoing by any particular defendant. It is this sort of inchoate, generalized form of pleading that fails to convey to the district court the

[5] Rule 8 in relevant part states that: "A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." FED. R. Civ. P. 8(a)(2).

> information it needs to determine whether a defendant is entitled to qualified immunity.

Id. at 922.

The *Kain* court described the progression of a Sixth Circuit case involving a qualified immunity defense. First, the plaintiff must adequately state his claim under the notice pleading requirements of Rule 8. If the defendant responds with the defense of qualified immunity, "then, at this point, plaintiff's complaint does not meet the heightened pleading requirement we enunciated in *Veney*[.]" *Kain*, 156 F.3d at 672. Plaintiff must come forward with specifics such as what happened, who was involved, when it happened, and the context in which it happened. If these factual allegations, taken as true, do not rise to the level of a constitutional violation, then the "claim would be subject to dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure or summary judgment. It would not be necessary to make a qualified immunity analysis." *Id.* If, however, plaintiff adequately responds by raising a constitutional violation, "then the qualified immunity analysis would have to be made." *Id.*

I suggest first that Plaintiff has met the Sixth Circuit's "heightened pleading" requirement. Plaintiff has given a very specific account of what he alleges happened in the dining area, as well as giving the case numbers of the previous lawsuits filed against Defendant which provide the context for the incident. He has included the names of those present, as well as statements given by them. Also included with his pleadings are copies of the Major Misconduct Report, the hearing report, and MDOC policy directives relevant

to this case. I therefore suggest that dismissal for lack of pleading specificity is inappropriate. As a result, as mandated by *Kain*, I suggest that qualified immunity analysis must be undertaken.

There are two steps that a district court must take when qualified immunity is raised in a motion to dismiss. First, the court must determine, as a purely legal matter, if the "allegations state a claim of violation of clearly established law[.]" *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86L. Ed. 2d 411 (1985); *see also Siegert v. Gilley*, 500 U.S. 226, 231, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991). Second, the court must decide if "the public official acted 'objectively unreasonable in light of [the] established constitutional right[].'" *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998)(quoting *Adams v. Metiva*, 31 F.3d 375, 387 (6th Cir. 1994)). This determination is necessary because it answers the "legal question of whether the defendant should have known that his alleged acts violated clearly established rights at the time." *Dominque v. Telb*, 831 F.2d 673, 677 (6th Cir. 1987).

To find a clearly established constitutional right, a district court in the Sixth Circuit must find binding precedent "from the Supreme Court, the Sixth Circuit, or from itself." *Cagle v. Gilley*, 957 F.2d 1347, 1348 (6th Cir. 1992). A district court may look finally to the decisions of other circuits. *Buckner v. Kilgore*, 36 F.3d 536 (6th Cir. 1994). The Supreme Court has explained that the right an official has allegedly violated must have been clearly established in a particularized sense. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates

that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). This ensures that government officials can reasonably "anticipate when their conduct may give rise to liability for damages." *Id.* at 639 (citing *Davis v. Scherer*, 468 U.S. 183, 195, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984)).

In November of 1997, Judge Duggan decided a summary judgment motion in a § 1983 retaliation case where the defendants argued they were entitled to qualified immunity on the grounds that "the law of retaliation was not clearly established because courts could not agree on the appropriate standard to be applied in such cases, and a prison official would not be on notice of exactly what conduct constitutes retaliation." *Jackson-El v. Winsor*, 986 F. Supp. 440, 443 (E.D. Mich. 1997). As evidence of the confused state of the law, defendants specifically pointed to Judge Hood's "willful violation" standard utilized in *Riley*, compared with *Cale's* mentioning of both the "shocks the conscience" and "egregious abuse of governmental power" tests. *Id.* Judge Duggan stated:

> In 1988, the Sixth Circuit indicated in *Cale* that a prison guard's retaliatory act must constitute an egregious abuse of governmental power to be actionable. Defendants acknowledge that the Sixth Circuit has never "abdicated" the *Cale* analysis. Furthermore, *Riley* was decided in 1995, long after the conduct allegedly occurred in this case, and the Sixth Circuit noted in *McLaurin* that it "has repeatedly demanded that retaliation claims arising from the exercise of First Amendment rights be shocking to the conscience." For these reasons, the Court is satisfied that as of 1993, when the incidents allegedly occurred, it was clearly established that a "shocks the conscience" approach was utilized in the Sixth Circuit.
>
> In addition, even if there was some dispute in the courts whether a "shocks the conscience," or a more liberal (to plaintiffs) "willful violation" approach should be employed, that dispute has no impact on this case. *Cale* **clearly held that the "framing" of a prisoner in retaliation for the**

> **exercise of his First Amendment rights was a severe abuse of governmental power.** . . . Conduct that was unlawful under the "shocks the conscience" standard would certainly remain unlawful under a "willful violation' standard. Therefore, **defendants were on notice that their alleged conduct was unlawful, even if they were unsure about the standard that would be used to analyze their conduct.**

Id. at 443-44 (citations and footnotes omitted)(emphasis added).

I suggest that the law of retaliation was clearly established at the time of the incident in question. As Judge Duggan reasoned, even if the appropriate *standard* to apply in First Amendment retaliation cases was not settled in this circuit, the wrongfulness of the conduct was. Moreover, the law was clearly established outside of this circuit as well. The Supreme Court has stated that the rule that the First Amendment bars retaliation for protected speech has "long been clearly established." *Crawford-El v. Britton*, __ U.S. __, 118 S. Ct. 1584, 1594, 140 L. Ed. 2d 759 (1998)("Even when the general rule has long been clearly established (for instance, the First Amendment bars retaliation for protected speech) . . ."). Likewise, the Second Circuit has stated that "the proscription of retaliation for a plaintiff's exercise of First Amendment rights has long been established." *Dobosz v. Walsh*, 892 F.2d 1135, 1141-42 (2d Cir. 1989). Therefore, I suggest that Plaintiff's allegations adequately state a violation of clearly established law.

The second question of law to be determined at this stage is whether a reasonable public official would have understood that the alleged conduct violated the plaintiff's rights. If a reasonable corrections officer should have known, then the defendant is not entitled to qualified immunity. Considering the volume of retaliation cases that have been

decided at all levels of the federal courts over the past ten years, I suggest that Defendant was on notice and should have known that his alleged conduct was unlawful.

In conclusion, I suggest that Defendant is not entitled to dismissal on the grounds of qualified immunity. Whether Defendant is entitled to summary judgment on this issue is discussed in section II.B.2.c.ii., *infra*.

iii. Heck & Balisok

Defendant's remaining argument for dismissal is that Plaintiff's action is barred by the Supreme Court's holdings in *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), and *Edwards v. Balisok*, 520 U.S. 641, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997).

In *Heck v. Humphrey* the Supreme Court addressed the issue of whether a state prisoner may challenge the constitutionality of his conviction in a suit for damages under 42 U.S.C. § 1983. The Court expressed concern that a prisoner could bring a § 1983 action in an effort to do an end run around the exhaustion requirements of habeas corpus, or could use a civil rights suit to develop factual findings in a federal court that could be issue preclusive on subsequent state actions challenging the fact or duration of confinement. To address those concerns, the Court concluded that a damages claim that calls into question the lawfulness of a conviction or confinement is not cognizable under § 1983. The Court held that

> in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove

> that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus[.]

Heck, 512 U.S. at 486-87(footnotes omitted). The Court went on to explain the initial inquiry that must be made when such a claim is brought before the federal courts:

> [T]he district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

Id. at 487(footnotes omitted). Examples of situations where "the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff" were provided by the Court. *Id.* One example is where an illegal search was conducted that yielded inculpatory evidence which, instead of being suppressed, was admitted as evidence at trial due to the application of either the doctrine of independent source or inevitable discovery. *Id.* at 487 n.7. In a situation such as this, a prisoner could bring a § 1983 suit for damages for the illegal search, prevail in that suit, and still not imply the invalidity of his conviction because the rules of evidence allowed for the conviction in spite of the constitutional violation. The Court explained that in such a case, however, the "plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury, which . . . does not encompass the 'injury' of being convicted and imprisoned[.]" *Id.* (citations omitted).

Four justices, including Justice Ginsburg, joined Justice Scalia in the majority opinion in *Heck*. Justice Souter filed a concurring opinion in *Heck* that was joined by three other justices. He agreed with the new "favorable termination" rule, but disagreed with the majority's readiness to have it apply as an "element" of every § 1983 case. He argued that it should not apply to persons who were not "in custody" and thus had no habeas remedy, even if a favorable § 1983 judgment would suggest the invalidity of that individual's prior state conviction. If it were applied to those plaintiffs, then

> the result would be to deny any federal forum for claiming a deprivation of federal rights to those who cannot first obtain a favorable state ruling. The reason . . . is that individuals not "in custody" cannot invoke federal habeas jurisdiction, the only statutory mechanism besides § 1983 by which individuals may sue state officials in federal court for violating federal rights. That would be an untoward result.

Heck, 512 U.S. at 500.

In 1997, the Supreme Court extended the holding of *Heck* to § 1983 claims for damages by prisoners alleging a violation of their rights in a prison disciplinary procedure which led to punishment (such as toplock, administrative segregation, or loss of good time credits). *In Edwards v. Balisok*, 520 U.S. 641, 117 S. Ct. 1584, 1589, 137L. Ed. 2d 906 (1997), the court held that a prisoner's civil rights suit for damages based on allegations of bias of the prison's disciplinary hearing officer was not cognizable under § 1983 because a decision in the prisoner's favor would necessarily imply the invalidity of the discipline imposed.

Heck's "favorable termination" rule continued to evolve in Supreme Court jurisprudence. In *Spencer v.Kemna*, __ U.S. __, 118 S. Ct. 978, 989, 140 L. Ed. 2d 43 (1998), Justice Ginsburg abandoned Justice Scalia's five justice majority opinion in *Heck* and joined the reasoning of Justice Souter's *Heck* concurrence. Justice Ginsburg stated: "I have come to agree with Justice SOUTER's reasoning: Individuals without recourse to the habeas statute because they are not 'in custody' (people merely fined or whose sentences have been fully served, for example) fit within § 1983's 'broad reach.'" *Id.* at 990. She added, "'Wisdom too often never comes, and so one ought not to reject it merely because it comes late.'" *Id.* (quoting *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600, 69 S. Ct. 290, 293, 93 L. Ed. 259 (1949)(Frankfurther, J., dissenting)).

Thus, it is now clear that five justices of the Supreme Court would limit *Heck* and its progeny to petitioners who attempt to bring a § 1983 action directly or indirectly challenging a conviction or disciplinary matter when such plaintiffs are "in custody" and have an available federal remedy in habeas corpus.

Defendant argues that "[b]ecause plaintiff here claims that the misconduct ticket he received was retaliatory, he is thus 'imply[ing] the invalidity of the punishment imposed' upon him, and his claim 'is not cognizable under § 1983.' Therefore, this complaint should be dismissed." (Def.'s Mot., Dkt. 9 at 3 (quoting *Balisok*).)

I suggest however, that, in light of *Spencer,* there simply is not a *Heck/Balisok* issue present when a plaintiff brings a § 1983 claim when he or she is no longer "in custody."

When applying *Heck/Balisok/Spencer* to the prison context, where there has been no deprivation of good-time credits and the inmate has served whatever period of time in segregation or toplock that was imposed by the hearing officer, there is no concern that a § 1983 action could be used as an end run on the habeas exhaustion requirement or for issue-preclusive effects to force a state court to reach a conclusion that the disciplinary hearing was invalid. Thus, the reasons for applying a "favorable termination rule" are not present.

In this case, the sanctions Plaintiff received from the hearing officer were 7 days of detention and 30 days loss of privileges. These were given in punishment for the violation of Insolence. Since Plaintiff agrees that he was guilty of Insolence, these call only be considered to the extent that Plaintiff asserts he would not have been insolent but for the Defendant's provocation. However, the six days of mandatory pre-hearing toplock Plaintiff experienced as a result of being charged with a nonbondable offense are definitely in issue, and this sanction had been served by the time Plaintiff commenced his § 1983 action. Thus, he was not "in custody" in the relevant sense of *Spencer* that would allow him to bring a habeas corpus action with respect to the alleged provocation of the incident and wrongful pre-hearing detention.[6]

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[6] Plaintiff clearly is still "in custody" with respect to his original conviction. However, he is no longer in the more restrictive custody of toplock or administrative segregation, nor in the more extended custody that would still face him had he lost any good-time credit. Thus, he is not "in custody" within the meaning of 28 U.S.C. § 2254 and could not bring a habeas action with respect to his misconduct ticket and its sanction.

Based on the foregoing analysis, I suggest that *Heck* and *Balisok* are inapplicable to the instant case and therefore do not bar Plaintiffs § 1983 action.

Alternatively, even if Justice Ginsburg had not changed her position in *Spencer*, the Plaintiff argues that the *Heck/Balisok* rule would not preclude his case. He states:

> [P]laintiff argues that his claim is not barred by [*Balisok*] or *Heck* as he is not attempting to attack the validity of the charge he was found guilty of on 5-27-97 (026 Insolence), but instead is alleging that he was framed and falsely charged for the offence of threatening behavior for which he was found unambiguously not guilty.
>
> * * *
>
> In this case, defendant falsely charged plaintiff with conduct the plaintiff did not perform and the prison hearing officer found that "[t]he resident made no threats of physical injury or specific threats of assault," as alleged by defendant. Therefore, a finding in this case that defendant framed plaintiff for disciplinary action in retaliation for the exercise of his First Amendment rights would not necessarily imply the invalidity of the 5-27-97 guilty finding of Insolence.

(Pl.'s Response, Dkt. 16 at 2,4.)

I suggest that the reasoning of Plaintiff is persuasive. The rule of *Heck* and *Balisok* (pre-*Spencer*) would not bar Plaintiff's case because the facts present one of the "exceptions" where a favorable outcome of the § 1983 action would not imply that the disciplinary hearing officer's finding was invalid. Plaintiff asserts that Defendant instigated an incident in an effort to frame Plaintiff, and then when Plaintiff did respond, Defendant wrote the misconduct ticket for a more severe charge than was necessary. The hearing officer's finding that the charge Defendant made was excessive and unsupported by the facts actually bolsters Plaintiff's claims in the instant action -- rather than being

diametrically opposed to them. Therefore, I suggest that, even if Justice Ginsburg's change of position was not considered, *Heck* and *Balisok* still would not prevent this case from proceeding. As a result, I suggest that on this ground, Defendant's Motion to Dismiss should be denied.

c. Motion for Summary Judgment.

i. Effect of Misconduct Hearing Finding

Defendant's third argument in his instant motion is that the finding of guilt on the related misconduct charge defeats Plaintiff's claim that the ticket was retaliatory and an abuse of authority. Since this issue necessarily concerns documents outside of the pleadings, I construe this as an argument in support of defendant's prayer for summary judgment. Defendant asserts that "[w]riting a major misconduct for violating the rules is not an egregious abuse of authority or shocking to the conscience," and that Plaintiff has failed to prove that Defendant "Close would not have written this ticket absent a motive to retaliate." (Def.'s Mot., Dkt. 9 at 4.)

The substantive question presented here is whether the Defendant has shown conclusively that there exists no genuine issue as to material fact regarding whether Plaintiff's right to substantive due process was violated. In making this determination, the court must consider all of the evidence presented, together with all inferences to be drawn therefrom, in the light most favorable to the Plaintiff.

There are many facts of this case on which both sides agree. All parties agree that Defendant initiated eye contact with the Plaintiff while Plaintiff was in the dining area, that

Defendant then entered the dining area and began walking toward Plaintiff, and that Plaintiff then stood up and walked toward Defendant. They came within inches of each other. No physical contact took place. Plaintiff was handcuffed and removed. Defendant wrote up a Major Misconduct Report charging Plaintiff with Threatening Behavior. A hearing was held where Plaintiff was found not guilty of Threatening Behavior, but was found guilty of Insolence.

Plaintiff further asserts facts that Defendant has not agreed with, but which this court is required to give credence to on a motion for summary judgment. Plaintiff alleges that Defendant was "staring continuously at him in an effort to intimidate him," and that "[w]hen plaintiff stared back at the defendant, defendant made a fighting stance and then approached plaintiff at a fast pace with his face contorted." (Pl.'s Response, Dkt. 16 at 8.) These facts, if proven true, could indicate that Defendant did "instigate" the confrontation. Plaintiff points to the statement of Defendant's Supervising Officer, Sergeant Tipton, as support for these assertions. Sgt. Tipton wrote out the following statement which was read at the misconduct hearing:

> While standing next to [Defendant] Close I observe[d] [Defendant] Close make a body movement by going forward and hunching his shoulders at the same time hold his arms out and hands facing (palms) upward. [sic] At this time [Defendant] Close started walking toward the table area were [sic] the prisoner were eating. At the same time [Plaintiff] Mease-X jump[ed] up and started walking directly towards [Defendant] Close. The two end up in each other face 1 inch apart. [sic] Just standing looking each other in the eyes. C/O Metevia then applied cuffs to [Plaintiff] Mease-X without incident. Mease-X was then excorted [sic] to Unit Two without incident. This writer asked [Defendant] Close why he went in the chow area in that manner - he

> stated he was just going to ask [Plaintiff] Mease-X why does he keeps on Marquetteing him. [sic]

(Pl.'s Exhibits, Dkt. 14, Ex. A at 5-6.) Sgt. Tipton's statement corroborates Plaintiff's assertions that Defendant made some out-of-the-ordinary body movements toward Plaintiff. I suggest that the inference which could be drawn therefrom is that Defendant purposely took these actions to provoke Plaintiff into jumping up to defend himself.

The Supreme Court has recently held that when a plaintiff brings a constitutional claim against a government official where proof of motive is an element, the trial court may not impose a heightened proof requirement which demands that a plaintiff must prove motive by clear and convincing evidence at the summary judgment stage. *Crawford-El v. Britton*, __ U.S. __, 118 S. Ct. 1584, 1595, 140 L. Ed. 2d 759 (1998). I suggest that Plaintiff has presented sufficient evidence to this court on the issue of intent to show that a material issue of fact is in dispute. As stated above, a rational trier of fact could infer from Sgt. Tipton's statement, in addition to Plaintiff's assertions, that Defendant Close intended to frame Plaintiff. It comes down to an issue of credibility, which cannot be decided by the court on a motion for summary judgment. *See Bloch v. Ribar*, 156 F.3d 673, 682 (6th Cir. 1998)("Accordingly, 'claims involving proof of a [defendant's] intent seldom lend themselves to summary disposition.'")

Defendant points to the cases of *McLaurin v. Cole*, discussed *supra*, and *Orebaugh v. Caspari*, 910 F.2d 526 (8th Cir. 1990), where the Eighth Circuit stated that "[n]o claim can be stated when the alleged retaliation arose from discipline for acts that a prisoner was

not entitled to perform." *Orebaugh*, 910 F.2d at 528. I suggest that these cases can be distinguished. In those cases the prisoners were found guilty of the charged misconduct. Here, Plaintiff was found not guilty of the charge the officer made against him, that being Threatening Behavior. The hearing officer specifically found that "[t]he resident made no threats of physical injury of specific threats of assault thus the charge is changed to Insolence." (Pl.'s Exhibits, Dkt. 14, Ex. A. at 1.)

In addition, Plaintiff's complaint is not solely based on the writing of the misconduct ticket as the act of retaliation. His complaint instead is two-fold: first, that Defendant instigated the entire confrontation to provoke Plaintiff, and second, when that plan was successful, Defendant then wrote Plaintiff up for a more severe violation, (one that required mandatory immediate detention), than was warranted by Plaintiff's actions. Plaintiff alleges that both of these acts were purposely taken in an effort to retaliate. Plaintiff does not dispute that he was guilty of Insolence. He admits that he stood up, ready to defend himself against what he perceived as an oncoming threat. Under Plaintiff s theory of the case, there would have been no misconduct report but for the provocation of Defendant. I therefore suggest that the hearing officer's finding that Plaintiff was guilty of Insolence does not defeat Plaintiff's claim that Defendant retaliated against him by provoking the incident and then charging Plaintiff with a more severe violation than was warranted. It is consistent with Plaintiffs claims.

The Sixth Circuit has held that "a District Court may grant a motion for summary judgment only if it finds from the whole record before it that there are no material facts

which are in dispute. It may not make findings of disputed facts on a motion for summary judgment." *Watkins v. Northwestern Ohio Tractor Pullers Assn.*, 630 F.2d 1155, 1158 (6th Cir. 1980)(citations omitted). I suggest that the disputed issue of Defendant's intent is material to the claim of retaliation, and is an issue of fact to be decided by the trier of fact at trial, not a matter of law to be determined by a court on a motion for summary judgment.

I also suggest that Plaintiff has sufficiently alleged, at this pre-discovery stage, a nexus between Plaintiffs asserting his First Amendment rights and the incident in question. Plaintiff has shown that this incident took place while the appeal was pending on Plaintiff's second lawsuit against Defendant. In addition, Plaintiff asserts that at this time he also had "initiated an institutional investigation including defendant on 5-16-97 of which Lt. J. Chudzinski had notified me was underway on 5-17-97." (Pl.'s Response, Dkt. 16 at 3.) Although Plaintiff has not presented conclusive proof to this court that there was a sufficient link between Plaintiff's filing of the lawsuits or prison investigation and Defendants alleged retaliatory conduct, Plaintiff is not required to prove at the summary judgment stage. The questions of whether Defendant performed the alleged acts, as well as whether retaliation was a substantial or motivating factor behind them, are questions for a jury.

In conclusion, I suggest that there are at least three disputed issues of material fact present: (1) whether Defendant intentionally committed the act of instigating a confrontation with Plaintiff, (2) whether Defendant intentionally charged Plaintiff with a

more severe prison violation than was warranted, and (3) whether he did these alleged acts with the motivation to retaliate against Plaintiff for exercising his First Amendment rights. Therefore, I suggest that Defendant's summary judgment motion should be denied.

Therefore, I suggest that Defendant's summary judgment motion should be denied.

ii. Qualified Immunity

Defendant's motion was a combined one for dismissal and/or summary judgment, which raised qualified immunity generally as a defense. However, recent Sixth Circuit caselaw calls for compartmentalized analysis in the qualified immunity arena. Different questions are considered when qualified immunity is raised as grounds for dismissal versus when it is raised as grounds for summary judgment. The Supreme Court stated:

> Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law [so as to preclude dismissal], the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.

Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985). The Sixth Circuit quoted from this passage in the case of *Russo v. City of Cincinnati*, 953 F.2d 1036, 1043 (6th Cir. 1992), when it noted that, in the context of a motion for summary judgment, the court must decide the legal question of whether the plaintiff has presented "'evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.'"

In this case, although discovery has not yet taken place, it is relevant to note that Defendant has conceded that he committed the *acts* the Plaintiff has alleged, at least to a substantial degree. The *intent* behind those acts, however, is material to Plaintiffs claim

and is in dispute. Therefore, I suggest that summary judgment is inappropriate at this time, and that the case should proceed to the discovery stage.

III. REVIEW

The parties to this action may object to and seek review of this Report and Recommendation within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. section 636(b)(1). Failure to file specific objections constitutes a waiver of any further right of appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981), *Thomas v Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985), *Howard v. Secretary of HHS*, 932 F.2d 505 (6th Cir. 1991). The parties are advised that making some objections; but failing to raise others, will not preserve all the objections a party may have to this Report and Recommendation. *Smith v. Detroit Fed'n. of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987), *Willis v. Secretary of HHS*, 931 F.2d 390, 401 (6th Cir. 1991). Pursuant to E.D. Mich. LR 72. 1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

CHARLES E. BINDER
United States Magistrate Judge

DATED: November 23, 1998

Copies to: Shakur Muhammad, #213302, Ionia Maximum Facility, 1576 W. Bluewater Highway, Ionia, MI 48846
Ms. Christine Campbell, Assistant Attorney General, Corrections Division, P.O Box 30217, Lansing, MI 48909
Honorable Robert H. Cleland, United States District Judge (Hand Delivered)

FILED

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

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EAST [illegible]

SHAKUR MUHAMMAD, #213302

Plaintiff,

v. Case No: 98-CV-10153-BC

MARK CLOSE,

Defendant.
_____/

ORDER ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. Introduction

This prisoner civil rights complaint, brought pursuant to 42 U.S.C. § 1983, is before the court on plaintiff's motion to amend the complaint and defendant's motion to dismiss and/or for summary judgment. The matter was referred to United States Magistrate Judge Charles E. Binder pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.1. The magistrate judge issued his report on November 24, 1998, recommending that the court grant plaintiff's motion to amend and deny defendant's motion to dismiss and/or for summary judgment. Defendant filed objections and plaintiff responded. Having reviewed the file, the magistrate's report, the objections and the response thereto, and having made a *de novo* review of the portions of the report to which plaintiff raised objections, the court determines that the findings and conclusions of the magistrate judge are correct and

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adopts the same for the purposes of this order.

II. Background

Plaintiff is a prisoner. (R&R at 2.) Over the course of his incarceration, plaintiff has filed a number of lawsuits and grievances against, among others, the defendant in the instant case--a corrections officer. (*Id.* at 2-3.) In the instant case, plaintiff alleges that as a result of exercising his First Amendment rights--through filing the lawsuits and the grievances--defendant retaliated by instigating a confrontation with plaintiff and then falsifying or exaggerating plaintiff's part in the incident. Defendant charged plaintiff in a misconduct report with "threatening behavior"--a mandatory nonbondable charge, (r&r at 4); plaintiff was later found not to have committed "threatening behavior" but was found to have committed "insolence"--not a mandatory nonbondable charge. (R&R at 5.) The relevant facts and positions of the parties are more fully laid forth in the magistrate judge's report and need not be repeated here.

III. Standard

The magistrate analyzed portions of defendant's motion under Rule 12 and portions under Rule 56 of the Federal Rules of Civil Procedure. Since the court will consider matters outside the

pleading, defendant's objections will by analyzed under Rule 56.[1] Fed. R. Civ. P. 12(b).

Under Rule 56, summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(c). "Where the moving party has carried its burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record construed favorably to the non-moving party, do not raise a genuine issue of material fact for trial, entry of summary judgment is appropriate." *Gutierrez v. Lynch*, 826 F.2d 1534, 1536 (6th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). Summary judgment is not appropriate when "the evidence presents a sufficient disagreement to require submission to a jury." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The existence of some factual dispute does not defeat a properly supported motion for summary judgment; the disputed factual issue must be material.

The burden placed upon the movant for summary judgment is to show that the non-moving party has failed to establish an essential element of its case upon which the non-moving party would bear the ultimate burden of proof at trial. *Celotex Corp.*,

[1] The court notes, however, that the holding of this order would not change if the court analyzed defendant's objections under Rule 12(b) of the Federal Rules of Civil Procedure.

477 U.S. at 322. But the moving party need not support its motion with affidavits or other similar materials "negating" the opponent's claim. *Id.* at 323. Once the moving party meets this burden, the burden passes to the non-moving party to establish, after an adequate opportunity for discovery, the existence of a disputed factual element necessary to its case with respect to which it bears the burden of proof. *Id.* The non-moving party must show that there is sufficient evidence for a jury to return a verdict in its favor, *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989), i.e., that there is doubt as to the material facts and that the record, taken as a whole, does not lead to a judgment for the movant. *Id.* at 1478. The non-moving party must present affirmative evidence on critical issues. *Id.*

In regard to a magistrate's report and recommendation, the filing of timely objections to such a report requires the court to "make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). See *Thomas v. Arn*, 474 U.S. 140, 142, 149 (1985), *reh'g denied*, 474 U.S. 1111 (1986); *Neuman v. Rivers*, 125 F.3d 315, 322-23 (6th Cir.), *cert denied*, __ U.S. __, 118 S. Ct. 631 (1997); *Howard v. Secretary of Health and Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947, 950 (6th Cir. 1981). In order to qualify as a proper objection, the objection must be

sufficiently specific to alert the reviewing court to the disputed issues. *Howard*, 932 F.2d at 509; *Walters*, 638 F.2d at 950. A generalized objection is the functional equivalent of a failure to object. *Howard*, 932 F.2d at 509.

IV. Discussion

Defendant raised five objections to the magistrate's report which the court will address seriatim.

A. Objection One

Defendant's first objection is that the magistrate's view of the facts is not sufficiently supported by the record. (Def. Br. at 1.) The magistrate determined that plaintiff pled facts sufficient to withstand defendant's motion. (R&R at 11-16, generally throughout). The court finds the magistrate's position correct.

Plaintiff presents evidence to create a genuine issue of material fact, *see Gutierrez*, 826 F.2d at 1536, as to whether defendant instigated and exaggerated an incident in retaliation. Aside from his compliant, plaintiff offers his own affidavit, dated September 14, 1998, which avers that defendant instigated the dining room incident and also alleges facts indicating that defendant's motive was retaliation. (Pl. Ex. 4.) Further, an affidavit of Zebadiah Holland, a fellow inmate, indicates that the correctional officers "continual [sic] to harass [plaintiff]." (Pl. Ex. 2.) The report from the hearing

investigator also contains evidence supporting plaintiff. The report offers statements from the following people: Bellows, an employee--"that was wrong on the officers part"; Jones-el, an inmate--"[t]hen the officer stepped in front of him"; and Screws, another inmate--"[defendant] started calling the guy all types of names." (Pl. Ex. A at 4.) In addition, Sergeant Tipton, who was standing next to defendant at the beginning of the incident explained that he "observe [sic] [defendant] make a body movement by going forward and hunching his shoulders [and] at the same time hold his arms out and hands facing (palms) upward." (Pl. Ex. A at 5.) Although defendant interprets this movement as a gesture of saying "'I don't know,'" (def. br. at 2), it could just as easily be interpreted as a gesture soliciting a fight.

Moreover, defendant argues that "the hearing officer found that it was *[p]laintiff* who came at [defendant] in an 'alarming manner'" (def. br. at 2)(emphasis in original); the court, however, finds defendant's use of this statement exaggerated. The hearing report actually indicates only that plaintiff "got up from his seat in an alarming manner," (pl. ex. A), not that plaintiff "came at" defendant in an alarming manner. Further, defendant's brief implies that the hearing report rules out instigating conduct by defendant. It does not. Rather, it merely describes the actions of plaintiff without making direct reference to the appropriateness or inappropriateness of

defendant's actions.

Contrary to defendant's assertions, the magistrate did not "concur with the [p]laintiff's claim that [defendant] 'instigated' the incident," (def. br. at 2), nor "redecid[e] the factual issues and find[] that [defendant] was at fault" (def. br. at 3); instead, the magistrate merely suggests that when the evidence is construed in plaintiff's favor it survives defendant's motion. The court agrees. Defendant's first objection is denied.

B. Objection Two

Defendant's second objection challenges the magistrate's application of plaintiff's different but related misconduct charge.[2] (Def. Br. at 3.) Stated otherwise, defendant argues that the magistrate should have applied *Orebaugh v. Caspari*, 910 F.2d 526 (8th Cir. 1990) in defendant's favor. However, besides the fact that *Orebaugh* is not controlling authority in this circuit, it is factually distinguishable from the instant case. The *Oregaugh* court explains that "[w]hile a prisoner can state a claim of retaliation by alleging that disciplinary actions were based upon false allegations, no claim can be stated when the alleged retaliation arose from discipline imparted for acts that a prisoner was not entitled to perform." *Id.* at 528. In

[2] As noted earlier, defendant filed a misconduct report against plaintiff charging "threatening behavior," but plaintiff was found only to have committed "insolence." R&R, *supra*, at 2.

Orebaugh, there was no averment by the plaintiff that the violation report did not correspond with the actions of the plaintiff. In the instant case the misconduct report was determined not to be an accurate description of what actually occurred. An exaggerated report--should it be proved exaggerated--could be construed as a false report. Further, in *Orebaugh*, unlike the instant case, there was no allegation that the defendant instigated the conduct. Defendant's second objection is denied.

C. Objection Three

Defendant's third objection is that, despite the magistrate's recommendation, there is no evidence to support a finding that the misconduct ticket was written in retaliation because there is too great a time period between the prior lawsuits and grievances and the dining room incident. (Def. Br. at 4.) Defendant relies heavily on *Bensen v. Cady*, 761 F.2d 335 (7th Cir. 1985)--another non-controlling and factually distinguishable case. In *Bensen*, the court indicated that the retaliation claim was an afterthought with inadequate factual support that should have been pled separately; *Bensen* spoke of only one lawsuit filed by the prisoner; and the *Bensen* plaintiff did not allege that the "retaliation" was in any way detrimental to him. *Id.* at 342. Moreover, the *Bensen* court merely indicated that "[t]he lengthy period of time [five months] between the

incident.

Second, defendant argues that there is insufficient evidence to show that he would have acted in the manner he did "but for" the plaintiff filing the lawsuits and grievances, relying again on the "lengthy period of time" discussion in *Benson v. Cady*, 761 F.2d 335, 342 (7th Cir. (1985). (Def. Br. at 5-6.) For the reasons previously discussed, the court determines that *Benson* does not prevent the finding that a genuine issue of material fact exists in the instant case sufficient to prevent summary judgment. Defendant's fourth objection is denied.

E. Objection Five

Defendant's fifth objection regards the magistrate's suggestion that plaintiff should be allowed to amend his complaint. Defendant generally argues that plaintiff's claim for monetary damages is barred by the Prison Litigation Reform Act because plaintiff suffered no physical injury. (Def. Br. at 6.) Defendant's objection, however, is nebulous. It is unclear whether (1) defendant is objecting to a finding of the magistrate or (2) defendant is arguing that plaintiff's motion to amend should be denied or (3) defendant is, for the first time, presenting a motion to dismiss the complaint based on the remedy sought by plaintiff.

The only reference by defendant to the magistrate's report is an observation by defendant that the magistrate cited

plaintiff's motion to amend. (Def. Br. at 6.) Because defendant does not allege specific error on the part of the magistrate and because the overall nature of the objection is vague, defendant's fifth objection is a generalized objection which is the functional equivalent of a failure to object. *Howard*, 932 F.2d at 509.

Moreover, plaintiff did allege some physical injury in both the original and amended complaint. Defendant's concerns regarding physical injury could been brought in a response to plaintiff's motion to amend the complaint. As noted by the magistrate, however, defendant simply failed to respond. (R&R at 8.) Further, a *pro se* civil rights complaint is governed by less stringent standards and should be dismissed only if "'it appears beyond doubt that the plaintiff[] can prove no set of facts which would entitle [him] to relief.'" *Brooks v. Seiter*, 779 F.2d 1177, 1180 (6th Cir. 1985). The court cannot say with certainty, based on defendant's affirmation, that plaintiff without a doubt suffered no physical injury. Additionally, plaintiff's original complaint seeks to have his prison record expunged; although plaintiff's motion to amend is unclear on this point, it is still possible that plaintiff seeks some relief other than monetary damages.

Furthermore, if defendant's argument constitutes a new motion to dismiss and/or for summary judgment based on

plaintiff's requested remedy, it is not proper to raise such a claim for the first time in objections to the magistrate's report. Defendant's fifth objection is denied.

V. Conclusion

Accordingly, IT IS ORDERED that the Magistrate Judge's Report and Recommendation is hereby ADOPTED.

IT IS FURTHER ORDERED that plaintiff's motion to amend the complaint is hereby GRANTED.

IT IS FURTHER ORDERED that defendant's motion for summary judgment is hereby DENIED.

Robert H Cleland

ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

March 26, 1999

- M/J Binder
- Shakur Muhammad
- Campbell

3-26-99

KRichards

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SHAKUR MUHAMMAD,
aka John B. Mease,

Plaintiff,

v.

MARK CLOSE,

Defendant.

CIVIL ACTION
NO. 98-CV-10153-BC

DISTRICT JUDGE DAVID M. LAWSON
MAGISTRATE JUDGE CHARLES BINDER

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON DEFENDANT CLOSE'S RULE 56(b) MOTION FOR SUMMARY JUDGMENT
(Dkt. 73)

I. RECOMMENDATION

For the reasons set forth below, **IT IS RECOMMENDED** that Defendant's motion for summary judgment be **GRANTED.**

II. REPORT

A. INTRODUCTION and FACTS

Pending, pursuant to a general case management Order of Reference from United States District Judge Robert Cleland,[1] (Dkt. 6), is Defendant Close's motion for summary judgment.

[1] Pursuant to Administrative Order 00-AO-045, issued August 22, 2000, United States District Judge David M. Lawson assumed responsibility for the Bay City docket effective September 5, 2000.

Plaintiff filed a response brief (Dkt. 75) and Defendant filed a reply (Dkt. 76). Upon review of the pleadings, I conclude that pursuant to E.D. Mich. LR 7. 1(e)(2), this motion is ready for Report and Recommendation without oral argument.

Plaintiff filed this prisoner civil rights complaint under 42 U.S.C. § 1983, claiming that "Defendant framed Plaintiff in retaliation for the Plaintiffs exercise of his First Amendment rights." (Compl., Dkt. 3 at 4B.) The incident in question occurred on May 21, 1997, while Plaintiff was incarcerated in general population at Standish Maximum Facility ("SMF"). Plaintiff alleges that Defendant Close, a corrections officer employed by SMF, instigated an incident with Plaintiff, and then filed an inflated misconduct charge against him, all with the intent of retaliating against Plaintiff for filing two previous civil rights lawsuits against Defendant Close and others, as well as for filing SMF grievances against Defendant.

Specifically, Plaintiff alleges that while he was eating breakfast in the dining area, he noticed Defendant Close staring at him. Plaintiff continued to eat, but when he looked up again, Defendant was still staring. At this time, Plaintiff began to stare back. Plaintiff alleges that Defendant then "made a fighting stance" towards him. (Compl., Dkt. 3 at 4A.) Plaintiff turned away to drink his coffee, and then noticed that Defendant was "coming into the dining area at a fast pace with his face contorted." *(Id.)* Plaintiff, feeling threatened by Defendant's body language and fast approach, stood up and walked towards the Defendant. Plaintiff alleges that when "Defendant and Plaintiff came within a foot of one another, Defendant stated, 'What's up,' while staring angerly [sic] at Plaintiff. Plaintiff did not respond." Plaintiff was then handcuffed

by two other officers and taken to a detention cell. *(Id.)*

Following this incident, Defendant Close filed a Major Misconduct Report charging Plaintiff with the major rule violation of "Threatening Behavior."[2] Six days after the incident, a Major Misconduct Hearing was held and Plaintiff was found not guilty of Threatening Behavior. *(Id.* at 1.) After reading witness statements from both inmates and officers, the hearing officer reduced the charge to Insolence.[3] Plaintiff was found guilty of Insolence. Plaintiff was given the disciplinary sanctions of seven days' detention and thirty days' loss of privileges for the violation. *(Id.)*

B. PROCEDURAL HISTORY

Plaintiff filed this action on June 2, 1998. The complaint alleges, first, that Defendant instigated the confrontation to provoke Plaintiff, and second, that when that plan was successful, Defendant then wrote Plaintiff up for a more severe misconduct violation, (one that required mandatory immediate detention), than was warranted by Plaintiff's action. Plaintiff alleges that

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[2] "Threatening Behavior" is a major rule violation defined as: "Words, actions or other behavior which expresses an intent to injure or physically abuse another person. Such misconduct includes attempted assault and battery." MDOC P.D. 03.03.105, Attachment B at 2. It is a "[m]andatory 'nonbondable' charge." *Id.* at 1. The Policy Directive lists the following as common examples of Threatening Behavior: "Threats of sexual assault made by one prisoner to another prisoner; writing threatening letters to another person; threats made to a third person which are intended to place the person threatened in fear of harm. *Id.* at 2.

[3] Insolence" is also classified as a major rule violation. Its definition is: "Words, actions, or other behavior which is intended to harass, or cause alarm in an employee." *Id.* at 3. It is not, however, a mandatory nonbondable charge. Common examples of Insolence are: "Abusive language, writing or gesture directed at an employee." *Id.*

both of these acts were purposely taken in an effort to retaliate against him for exercising his constitutional right to file lawsuits.

In July 1998, Defendant Close filed his initial motion for dismissal and/or summary judgment on the following grounds: (1) that *Edwards v. Balisok*, 520 U.S. 641, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997), barred Plaintiffs claim; (2) that the finding of guilt on the misconduct charge defeated Plaintiff's claim that the ticket was retaliatory and an abuse of authority; and (3) that Defendant was entitled to qualified immunity. (Dkt. 9.) This Court recommended denial of the motion in a Report and Recommendation ("R&R") dated November 24, 1998. The R&R suggested that, when construing the allegations found in the complaint as true and viewing them in the light most favorable to Plaintiff, there were three issues of material fact in dispute: (1) whether Defendant intentionally committed the act of instigating a confrontation with Plaintiff; (2) whether Defendant intentionally charged Plaintiff with a more severe prison violation than was warranted; and (3) whether he did these alleged acts with the motivation to retaliate against Plaintiff for exercising his First Amendment rights. Judge Cleland adopted the Report and Recommendation on March 26, 1999, over Defendant's objections. (Dkt. 22.)

Subsequently, Plaintiff was appointed counsel and the parties engaged in discovery. Defendant Close then brought a motion for dismissal on two grounds: (1) that Plaintiff failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a); and (2) that Plaintiff failed to allege a physical injury as required by the PLRA, 42 U.S.C. § 1997e(e). On November 2, 2000, this Court recommended denial of the

motion (Dkt. 68), and on January 12, 2001, Judge Lawson adopted the Report and Recommendation over Defendant's objections. (Dkt. 71.)

Defendant Close now brings another motion for summary judgment, asserting that "after discovery, the above three issues [of material fact] have been resolved in Officer Close's favor and that there is no reasonable dispute that necessitates putting these questions before a jury." (Def. 's Mot., Dkt. 73 at 3.)

C. ANALYSIS AND CONCLUSIONS

1. Motion Standards

A motion for summary judgment will be granted under Rule 56(c) of the Federal Rules of Civil Procedure where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. All facts and inferences must be viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89L. Ed. 2d 538 (1986). The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact as to an essential element of the non-movant's case. *Street v. J. C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). In determining whether the moving party has met its considerable burden, a court may consider the plausibility of the moving party's evidence. *See Matsushita*, 475 U.S. at 587-88.

To defeat the motion, the non-moving party cannot rest merely on the pleadings alone. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 191 L. Ed. 2d 202 (1986).

The non-moving party has an obligation to present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Celotex*, 477 U.S. at 324. After examining the evidence, the court then determines "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1310 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 251-52). Summary judgment will not be granted "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

2. Retaliation Claim

a. Governing Law

When the first motion for summary judgment in this case was decided, the standard applicable to claims of retaliation for the exercise of First Amendment rights was not all that clear in the Sixth Circuit. *(See* R&R dated 11/24/98 at 12-17.) In March of 1999, however, the Sixth Circuit clarified the standard to be applied in the case of *Thaddeus-X v. Blatter*, 175 F.3d 378, 386 (6th Cir. 1999) (en banc). The *Thaddeus-X* standard is now applicable to this case. See *Herron v. Harrison*, 203 F.3d 410, 414 (6th Cir. 2000) (reversing district court's dismissal of prisoner's First Amendment retaliation claim because *Thaddeus-X* controlled even though it was decided eight months after district court dismissed the case).

In *Thaddeus-X*, the court confirmed that "government actions, which standing alone do not violate the Constitution, may nonetheless be constitutional torts if motivated in substantial

part by a desire to punish an individual for exercise of a constitutional right." *Thaddeus-X*, 175 F.3d at 386. The court clarified that there are three elements to a claim of retaliation based on the exercise of a specific constitutional right:

> (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two — that is, the adverse action was motivated at least in part by the plaintiff's protected conduct.

Id. at 394.

The first element requires that the plaintiff show that he engaged in conduct protected by law. The court explained that when a retaliation claim is brought by a prisoner, this element must take into consideration the plaintiff's incarcerated status:

> [I]t is generally much harder for a prisoner to show that his conduct is protected because prison regulations are allowed to infringe on prisoners' rights as long as they are rationally related to a legitimate penological concern. *See Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96L. Ed. 2d 64 (1987). Therefore, if a prisoner violates a legitimate prison regulation, he is not engaged in "protected conduct," and cannot proceed beyond step one.

Thaddeus-X, 175 F.3d at 395.

The term "adverse action" in the second element is derived from retaliation cases arising in the public employment context. In those cases, adverse action could include discharge, refusal to hire, or failure to promote. *Id.* at 396. In the prison context, the court explained,

> an action comparable to transfer to administrative segregation would certainly be adverse. In order to determine whether actions of lesser severity merit being deemed "adverse" for purposes of a retaliation claim, we adopt the standard suggested by Judge Posner in *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982),

> that an adverse action is one that would "deter a person of ordinary firmness" from the exercise of the right at stake.

Thaddeus-X, 175 F.3d at 396.

The third element -- a causal connection between the protected conduct and the adverse action -- begins with the plaintiff bearing the "burden of establishing that his protected conduct was a motivating factor behind any harm." *Id.* at 399.

b. First Element — Protected Conduct

In this case, Defendant Close does not dispute that Plaintiff has met the first element of a retaliation claim. Plaintiff claims that he was retaliated against because he named Defendant Close as a defendant in two prior lawsuits. It is well established that prisoners have a constitutional right of access to the courts, *see Bounds v. Smith*, 430 U.S. 817, 821-24, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977), and therefore Plaintiff has alleged that he engaged in protected conduct.

c. Second Element — Adverse Action

Plaintiff claims that the adverse action taken against him consisted of Defendant Close provoking him by coming into the dining area with a contorted look on his face after staring and making a "fighting stance" outside the window, and then, when Plaintiff reacted, Defendant "purposely overcharg[ing] Plaintiff with a nonbondable offense in order to ensure that he received toplock prior to his hearing." (Pl's Resp., Dkt. 75 at 8.) Defendant Close asserts and this Court agrees that both issues — whether he instigated the confrontation and whether he inflated the misconduct charge — relate to the second prong of the *Thaddeus-X* standard. (Def. 's Mot., Dkt. 73 at 3.) As a threshold matter, I suggest that these acts as alleged would rise to the

level of "adverse action" contemplated by the *Thaddeus-X* standard because being wrongfully charged with a non-bondable major misconduct violation and therefore placed in toplock could deter a person of ordinary firmness from continuing to engage in protected conduct. See *Thaddeus-X*, 175 F.3d at 396 ("an action comparable to transfer to administrative segregation would certainly be adverse."). However, the question presented by a summary judgment motion following discovery is not whether Plaintiff has stated a claim, but "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Booker*, 879 F.2d at 1310.

Defendant contends that, although Plaintiffs allegations are sufficient to survive a dismissal motion, he is entitled to summary judgment because discovery has not uncovered any evidence that he provoked Plaintiff by making a "fighting stance" as Plaintiff claimed in his complaint. Defendant states: "Before discovery, it was not clear whether Officer Close instigated the confrontation with Muhammad. Based on the deposition testimony, however, there is no longer any reasonable dispute over this issue." *(Id.)*

Defendant points to the deposition testimony of Corrections Officer Richard Metevia, Resident Unit Manager Darlene McIntire, and of Plaintiff himself in support of this position, drawing attention to the fact that the testimony is consistent with Defendant's contention that he did not make a "fighting stance," but rather that he thought Plaintiff was trying to say something to him through the glass so he simply made a "what do you want" gesture by raising his palms up. Officer Metevia was standing next to Defendant Close at the glass while they were looking

into the dining area, and described the gesture made by Defendant:

Q . . . Did you observe Mark Close making any motions towards the prisoner before he went into the chow area?

A Seemed like Mease said something and Close went, I can't hear you, whatever, you know, through the glass between them.

Q Now, I just realized we made a gesture, and the court reporter can't record that. Could you describe the gesture in words?

A Like palms up, "what did you say," you know.

Q So you lifted your lower arms up, and leaving the upper arms at your sides, you've lifted your lower arms up, palms up?

A Yeah.

(Metevia Dep., Dkt. 73, Ex. 3 at 19-20.) Officer Metevia also testified that from his observations, it did not appear that Defendant Close instigated a confrontation with Plaintiff. *(Id.* at 21.) Similarly, Resident Unit Officer Darlene McIntire, who was on duty in the dining area at the time of the incident, testified at her deposition that she witnessed Defendant Close come into the "chow hall" and stop, and "then Mease just walked in further and further, came right up into his face." (McIntire Dep., Dkt. 73 at Ex. 7.)

Defendant also contends that Plaintiffs own deposition testimony is consistent with Defendant's version of what happened:

A . . . He made this gesture towards me like this (indicating).

Q Okay. So this gesture is his hands are sort of straight out in front about —

A Like this (indicating).

Q About, what is that, two and a half, three feet apart. So were his palms up?

A Yes.

(Muhammad Dep., Dkt. 73, Ex. 6 at 11-12.)

When responding to a motion for summary judgment, the non-moving party cannot rest merely on the pleadings alone, *Anderson,* 477 U.S. at 248, but has an obligation to present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Celotex,* 477 U.S. at 324. In this case, Plaintiff has not presented any affirmative evidence in response to Defendant's motion other than cites to his own deposition testimony where he reiterates his allegation that Defendant instigated the confrontation by making an aggressive gesture similar to a "wrestling position." (Pl.'s Resp., Dkt. 75 at 5.) Instead, Plaintiff merely discounts the testimony of officers Metevia and McIntire, pointing out that they are co-workers of Defendant Close and employees of the MDOC, the entity that would have to pay any judgment if Plaintiff prevails. Plaintiff argues that "[a] jury may well discount such testimony as self-serving and biased." *(Id.)*

When analyzing this issue in the first R&R at the pre-discovery stage, the Court of course acted on the presumption that Plaintiff would uncover evidence during discovery, such as eyewitness testimony, that would support his allegations. Now, however, the Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Booker,* 879 F.2d at 1310. On this issue of whether Defendant Close instigated the incident by making a

"fighting stance," I suggest that the evidence proffered is, under this standard, entirely one-sided — favoring the Defendant.

Defendant Close similarly claims that he is entitled to summary judgment on the issue of whether he "overcharged" Plaintiff with the misconduct violation of Threatening Behavior. Defendant points to the deposition testimony of three witnesses in support of his argument that Threatening Behavior was an appropriate charge in light of Plaintiff's conduct. First, Sergeant Walter Tipton, who also witnessed the incident, was asked whether he perceived Plaintiffs conduct as threatening, and he responded: "Looked like he might was going to hit him or something was going to happen, that was obvious. If it was me personally, yeah, I may have felt threatened, if it was me personally." (Tipton Dep., Dkt. 73, Ex. 4 at 37.)

Second, Officer Metevia testified that he thought Defendant Close acted properly in writing the ticket. (Metevia Dep., Dkt. 73, Ex. 3 at 22.) Third, Hearing Officer Arvid Perrin, who found Plaintiff not guilty of Threatening Behavior but guilty of the lesser included offense of Insolence, testified that the Threatening Behavior charge was nevertheless not unjustified. He explained that, in his opinion, the fact that Plaintiff had not made an overt move to strike Defendant Close led him to the conclusion that the standard for Threatening Behavior had not been met, however, another hearing officer could have reached a different result:

> Q Now, just based on the facts of this [case], is this something where a different Hearing Officer could have reached a different decision [than] you?

> A More than likely, it could have been, yes. I'm sure that some Hearing Officers would have felt that this was threatening behavior. .

(Perrin Dep., Dkt. 73 at Ex. *5.)*

Defendant therefore asserts, supported by the testimony presented, that he "had good reason, based on the intensity of the confrontation, for writing the Threatening Behavior ticket." (Def.'s Mot., Dkt. 73 at 9.)

In response to this issue, Plaintiff again has presented no directly relevant affirmative evidence, but once more points out that the witnesses relied upon by Defendant are MDOC employees who have an interest in the matter. Plaintiff does provide the Court with a statistical report prepared by the MDOC showing major misconduct hearing statistics for all MDOC hearing officers, including the percentage of misconduct hearings where the charges were upheld, reduced, or dismissed. Plaintiff argues that Hearing Officer Perrin's testimony that another hearing officer may have found Plaintiff guilty of Threatening Behavior could be found by a jury to be "incredible" in light of the fact that the MDOC keeps such statistics and evaluates the performance of its hearing officers based upon the number of charges they uphold. (Pl. 's Resp., Dkt. 75 at 8-9.)

Once again I suggest that Plaintiff has failed to meet his burden of responding to the summary judgment motion with affirmative evidence of a sufficient disagreement to require submission to a jury. Obviously, Plaintiff does not have the burden of persuading this Court at the summary judgment stage to the same degree it would have to persuade a jury at trial. However, Plaintiff has failed to present any evidence other than Plaintiff's own allegations. His argument regarding the MDOC's performance evaluation methods may be engaging and

potentially admissible rebuttal at trial to testimony of Hearing Officer Perrin, but it is not evidence that Defendant Close's decision to charge Plaintiff with Threatening Behavior was an unreasonable overcharge in light of the facts.

d. Third Element - Causal Connection

The third element of a retaliation claim involves a defendant's subjective intent. See *Thaddeus-X*, 175 F.3d at 399. Plaintiff has the initial burden of showing that his protected conduct, which in this case was filing two previous lawsuits naming Close as a defendant, was a substantial or motivating factor behind the adverse action. See *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568. 50 L. Ed. 2d 471 (1977). Although a court may not require that a plaintiff prove motive by clear and convincing evidence at the summary judgment stage, *see Crawford-El v. Britton*, 523 U.S. 574, 118 S. Ct. 1584, 1595, 140 L. Ed. 2d 759 (1998), a plaintiff nonetheless must provide more than conclusory allegations of retaliatory motive to survive summary judgment. See *Smith v. Campbell*, 250 F.3d 1032, 1038 (6th Cir. 2000).

Plaintiff here states that "it is undisputed that Plaintiff was pursuing litigation against Defendant at the time of the incident in question. The jury is then left with the subjective credibility question of whether Defendant acted as he did because of those suits." (Pl.'s Resp., Dkt. 75 at 9.) Plaintiff has not, however, alleged that Defendant Close ever made any statements that he harbored bad feelings toward Plaintiff because of these prior lawsuits or that he intended to punish Plaintiff for filing them. Rather, Plaintiff's argument is solely that the temporal proximity

between the prior lawsuits and the dining room incident demonstrates a causal connection.

Defendant Close conversely claims that the timing of the prior lawsuits supports his position that he in no way was motivated to charge Plaintiff with misconduct because he wanted to retaliate for the prior suits. Defendant has provided copies of court dockets to show that the first lawsuit naming him as a defendant was filed by Plaintiff in December 1994, and summary judgment was granted to defendants in August 1995. The second suit was filed in February 1996 and was dismissed in December 1996. (Def. 's Mot., Dkt. 73 at 12, Exs. 8 & 9.) The alleged incident of retaliation which gave rise to this lawsuit occurred in May of 1997, two and a half years after the first suit was filed and one and a half years after the second. Defendant asserts that the intervals between the prior suits and this incident preclude any inference that the prior suits were a motivating factor behind his charging Plaintiff with misconduct. Furthermore, Defendant states that "[a]lthough Muhammad appealed these decisions [in the prior suits], there is nothing in the record showing that Officer Close was aware of Muhammad's appeals." *(Id.* at 12.) Defendant therefore asserts that Plaintiff has failed to establish a causal connection.

In his response to Defendant's summary judgment motion on this issue, Plaintiff has not presented any affirmative evidence other than the Plaintiff's own deposition testimony where he stated that there has been a "constant problem between me and him from 1994, from the time he chose to involve hisself [sic] with my litigation with other officers." (Pl.'s Dep., Dkt. 75 at Ex. 1.)

In *Smith v. Campbell*, 250 F.3d 1032 (6th Cir. 2001), the plaintiff claimed that he was transferred in retaliation for the grievances he filed against prison officials. With regard to the third element of the *Thaddeus-X* standard, the only valid connection plaintiff put forth concerning retaliatory motive was the fact that he was transferred only days after he informed his counselor that he was gathering documentation to file a grievance and a lawsuit.[4] *Id.* at 1038. The Sixth Circuit affirmed the district court's grant of summary judgment for defendants, stating:

> Aside from [the counselor's] statements, the temporal proximity between Smith filing his grievances and the decision to transfer him provides some circumstantial support for a causal connection. However, the Court concludes that this evidence alone is not sufficient to meet Smith's burden to show that the filing of grievances was a substantial or motivating factor for his transfer.

Id.

I suggest that in this case, as in *Smith*, the temporal proximity connection alone is insufficient to survive a motion for summary judgment. First, in this case the time frame between the protected conduct and the alleged retaliatory act is not a matter of days, but of years. It is entirely plausible that Defendant Close had no idea that Plaintiff had filed appeals of the prior lawsuits, and Plaintiff has not refuted that claim. *See Matsushita*, 475 U.S. at 587-88 (stating that in determining whether the moving party has met its considerable burden, a court may consider the plausibility of the moving party's evidence). Moreover, like in *Smith*, the temporal

[4] The Plaintiff also claimed that his counselor's alleged statement that the prison could transfer him at any time and say it was based on institutional needs supported the inference of retaliatory motive, but the Sixth Circuit rejected that notion because the counselor was not the decisionmaker with regard to the transfer. *Id.* at 1038.

proximity claim is the sole support for Plaintiffs claim that Defendant Close acted with retaliatory animus, as apparently no statements from Defendant or others were adduced in discovery which could serve as evidence to put before a jury to satisfy this element.

e. Conclusion

I therefore suggest that, faced now with the Defendant's well-supported motion for summary judgment, Plaintiff has failed to come forward with evidence on which a jury could reasonably find that Defendant Close retaliated against Plaintiff because of his prior lawsuits. Although Plaintiff has met one element of a retaliation claim, and his *pro bono* counsel has vigorously advocated Plaintiff's position, the evidence on the other two elements is so one-sided that one party must prevail as a matter of law. *Anderson*, 477 U.S. at 251-52. Accordingly, I suggest that Defendant's motion for summary judgment be granted.

Because I have suggested that Plaintiff has failed to present sufficient evidence to survive summary judgment, the alternate grounds for summary judgment presented in Defendant's motion shall not be addressed.

III. REVIEW

The parties to this action may object to and seek review of this Report and Recommendation within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1). Failure to file specific objections constitutes a waiver of any further right of appeal.

See Thomas v. Am, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *Howard* V. *Sec'y of Health & Human Servs.*, 932 F.2d 505 (6"' Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6"' Cir. 1981). The parties are advised that making some objections, but failing to raise others, will not preserve all the objections a party may have to this Report and Recommendation. See *Willis v. Sec 'y of Health & Human Servs.*, 931 F.2d 390, 401 (6"' Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6"' Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

CHARLES E. BINDER
United States Magistrate Judge

DATED: August 15, 2001

Copies to: Ms. Wendy Davis Kanar, Attorney at Law, 414 Townsend St., P.O. Box 632, Midland, MI 48640
Mr. Kevin Himebaugh, Assistant Attorney General, Corrections Division, P. 0. Box 30217. Lansing, MI 48909
Honorable David M. Lawson, United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SHAKUR MUHAMMAD,
aka John B. Mease,

Plaintiff,

v.

MARK CLOSE,

Defendant.

No. 98-CV-10153-BC
Hon. David M. Lawson

OPINION AND ORDER ADOPTING REPORT AND RECOMMENDATION AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The plaintiff filed this prisoner civil rights complaint against the defendant, a corrections officer, alleging unlawful retaliation contrary to 42 U.S.C. § 1983. After two previous dispositive motions were denied, the defendant filed his third motion for summary judgment, alleging that the plaintiff offered insufficient evidence to proceed to trial on his First Amendment retaliation claim. After reviewing the initial motion papers, the plaintiffs response, and the defendant's reply brief, the Magistrate Judge, operating under a full-case reference pursuant to 28 U.S.C. § 636(b)(1), recommended that the defendant's motion be granted. After the plaintiffs pro bono counsel declined to file objections on his behalf, the plaintiff requested the right to file his own objections, and the Court granted that request on November 8, 2001. The plaintiff filed his objections on November 29, 2001. After *de novo* review of the Magistrate Judge's Report and Recommendation, and the papers filed in this case, the Court agrees that the defendant's motion should be granted.

I.

This case arose from an incident on May 21, 1997 while the plaintiff was incarcerated at the Standish Maximum Correctional Facility ("SMF"). The plaintiff alleges that the defendant, a corrections officer at SMF, intentionally provoked the plaintiff and wrote a violation accusing

the plaintiff of Threatening Behavior, a serious offense. Specifically, the plaintiff claims that he noticed the defendant staring at him through a dining room window, and that the plaintiff stared back. In response, the defendant allegedly stormed into the dining room, and the plaintiff then rose from his seat and approached the defendant. The plaintiff was then handcuffed and led away to a detention cell.

The defendant subsequently initiated disciplinary proceedings against the plaintiff, charging him with Threatening Behavior, defined as threatening words or behavior expressing an intent to injure another. See MDOC P.D. 03.03.105, P1's S.J. Ex. 2 at 2. Six days after the incident, a disciplinary hearing was held and the plaintiff was found not guilty of Threatening Behavior, but found guilty of the lesser charge of Insolence, defined as words, actions or other behavior intended to harass or cause alarm to an employee. See *id* at 3. The plaintiff was punished with seven days detention and thirty days' loss of privileges.

The plaintiff alleges that the provocation and write-up was in retaliation for two prior lawsuits filed by the plaintiff against the defendant. The plaintiff first filed suit against defendant Close in 1994; Close was granted summary judgment in 1995. The second suit was filed in February, 1996 and dismissed in December, 1996.

The defendant now contends that he is entitled to summary judgment because the plaintiff has failed to come forward with sufficient evidence to support his allegations that he was subjected to adverse action and that the action taken against him, even if adverse, was in retaliation for the prior suits.

II.

In the Sixth Circuit, a prisoner alleging retaliation for engaging in an activity protected by the First Amendment must establish three elements: the plaintiffs engagement in protected

conduct, adverse action taken against the plaintiff that would deter a person of ordinary firmness from engaging in protected conduct, and proof that the adverse action was motivated at least in part by the plaintiffs engagement in the protected activity. *See Thaddeus-Xv. B/alter,* 175 F.3d 378, 386 (6th Cir. 1999) (en banc). The first element is not disputed here: even though incarcerated, the plaintiff retains the right of access to the courts. See *Bounds v. Smith,* 430 U.S. 817, 821-24 (1977). The defendant instead challenges the plaintiffs showing on the second and third elements of his retaliation claim. The Magistrate Judge found that the defendant's showing on the second element was so one-sided that summary judgment was appropriate. However, the defendant's arguments against the third element are much stronger, and dispositive of this case.

When the plaintiff has the burden of proof on a claim, the defendant may support a motion for summary judgment when he demonstrates that the plaintiff lacks sufficient evidence on any element of that claim. *Street v. IC. Bradford & Co.,* 886 F.2d 1472, 1478 (6th Cir. 1989). Once the defendant has made such a showing, the plaintiff may not rely solely on his pleadings, but must offer affirmative evidence from which a reasonable fact finder could find in his favor. *See Matsushita Flee. Indus. Co., Ltd v. Zenith Radio Corp., 475* U.S. 574, 586-87 (1986). The plaintiff's showing must be more than an assertion that the trier of fact could disbelieve the defendant's proffered evidence. *Street,* 886 F.2d at 1479. Even when the plaintiff does offer affirmative evidence, however, the Court must view all reasonable inferences arising from that evidence in the light most favorable to the plaintiff. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52 (1986). As a result, although the plausibility of circumstantial evidence may be considered, any direct evidence offered by the plaintiff in response to a summary judgment motion must be accepted as true. *Adams v. Metiva,* 31 F.3d 375, 382 (6th Cir. 1994). However, when the evidence is so one-sided that no reasonable jury could find for the non-moving party

for the non-moving party, summary judgment as a matter of law should be granted. *Anderson*, 477 U.S. at 251-52.

On the third element of the plaintiffs retaliation claim, causation, the defendant has demonstrated a lack of affirmative evidence for the plaintiff's claim. Specifically, the defendant points out that the incident at issue in this case occurred two and a half years after the first suit was filed and one and a half years (actually about fifteen months) after the second. The defendant correctly notes that the temporal connection between these lawsuits and the incident in question is remote. In response to the defendant's motion, the plaintiff pointed to his prior litigation with the defendant, and further stated that there has been a "constant problem between me and him from 1994, from the time he chose to involve hisself [sic] with my litigation with other officers." Pl's Dep., dkt. 75, Ex. 1. In this Circuit, however, temporal proximity by itself is generally insufficient to establish causation for a retaliation claim. *See Smith v. Campbell*, 250 F.3d 1032, 1038 (6th Cir. 2000); *Nguyen* v. *City of Cleveland*, 229 F.3d 559, 566 (6th Cir. 2000). In the absence of additional probative evidence, the Sixth Circuit has specifically found that a delay of even five months is too long. *See, e.g., Hafford* V. *Seidner*, 183 F.3d 506, 518 (6th Cir. 1999) (two to five month delay is too long); *Cooper v. City of North Olmsted*, 795 F.2d 1265, 1272 (6th Cir. 1986) (four months too long). The time gap in this case is fifteen months, which is clearly outside the parameters established by the Sixth Circuit. Furthermore, the plaintiff's generalized assertion of animosity between himself and the defendant is plainly insufficient. Under the plaintiff's reasoning, he would be able to proceed with a retaliation claim anytime this defendant took adverse action against him. This result would create unreasonable disorder in the prison context, where officer-inmate animosity and civil rights lawsuits have evolved into a ritualistic form of social intercourse.

Thus, the Magistrate Judge's finding that the plaintiff had not sustained his burden of proof on this element was correct. In his objections to this finding, the plaintiff contends that temporal proximity is sufficient to establish this element, the clearly established precedential law of this Circuit to the contrary notwithstanding. He also claims that the case for causation is 'strengthened by' his absence from SMF for much of the time between the filing of his second lawsuit and the incident in question, and his assertion that the incident was the first time in several months that the defendant and the plaintiff had any personal contact. Pl's Obj. at 13-14. The plaintiff also attached his log of the events he deems significant occurring between 1996 and the incident in this case. *Id.* Ex. H, at 1-4. Even if these notes were admissible, there is still no direct evidence of animosity, such as statements made by the defendant, that the Court would be required to take as true. *See Adams*, 13 F.3d at 382. Further, the conclusion is inescapable that no reasonable fact finder would draw an inference of causation from these items. The plaintiff essentially asks this Court to trust his hunch that the defendant's adverse action against him was motivated by his past lawsuits. Given the clear precedent in this Circuit, however, that speculation and hunches are insufficient to defeat a summary judgment motion, the Court declines the plaintiff's invitation. *See Hartsel v. Keys*, 87 F.3d 795, 802 (6th Cir. 1996).

III.

Although, as noted in the rulings on the defendant's first two motions for summary judgment, the plaintiff's complaint properly pleads all the elements of a retaliation claim, the plaintiff has not been able to deliver factual support. The law is clear that the plaintiff may not rely on his pleadings alone. The plaintiff's prior history of litigation with the defendant is the only circumstantial support for his theory of retaliation. However, this Court is bound by Circuit

precedent that rejects the sufficiency of such evidence standing alone. The Magistrate Judge's Report and Recommendation is thus correct, and the defendant's motion for summary judgment will be granted.

Accordingly, it is **ORDERED** that the Magistrate Judge's Report and Recommendation is **ADOPTED.**

It is **FURTHER ORDERED** that the defendant's Motion for Summary Judgment [dkt #73] is **GRANTED.**

David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: December 17, 2001

Copies to:
Shakur Muhammad — #213302, 1576 Bluewater Highway, Ionia, MI 48846
Wendy Davis Kanar, Esq.
Kevin Himebaugh, Esq.
Honorable Charles E. Binder, United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SHAKUR MUHAMMAD,
aka John B. Mease,

Plaintiff,

v.

MARK CLOSE,

Defendant.

No. 98-CV-10153-BC
Hon. David M. Lawson

JUDGMENT

In accordance with the Opinion and Order entered on this date,

It is **ORDERED AND ADJUDGED** that the judgment is entered for the defendant and against the plaintiff.

It is further **ORDERED AND ADJUDGED** that the plaintiff takes nothing on its complaint, and the case be dismissed with prejudice.

David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: December 17, 2001

Copies sent to:
Shakur Muhammad - #213302, 1576 Bluewater Highway, Ionia, MI 48846
Wendy Davis Kanar, Esq.
Kevin Himebaugh, Esq.
Magistrate Judge Charles E. Binder

No. 02-1043

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHAKUR MUHAMMAD, also known as John E. Mease,

Plaintiff-Appellant,

v.

MARK CLOSE, Correctional Officer,

Defendant-Appellee

ORDER

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 28(g) limits citation to specific situation
Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

Before: MARTIN, Chief Judge; MOORE, Circuit Judge; WISEMAN, District Judge.*

Shakur Muhammad appeals a district court grant of summary judgment for defendant in this civil rights action filed under 42 U.S.C. § 1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Muhammad filed his complaint in the district court alleging that the defendant corrections officer falsely charged him with major misconduct threatening behavior in retaliation for prior lawsuits and grievances plaintiff filed against defendant. Plaintiff named defendant in his individual and official capacities and sought compensatory and punitive damages and expungement of the resulting misconduct conviction on a reduced charge of insolence. Defendant moved to dismiss the complaint or for summary judgment, and plaintiff responded in opposition and moved for leave to amend his complaint. The magistrate judge recommended that defendant's motion to dismiss or for summary judgment be denied and that plaintiffs motion to amend his complaint be granted, and

* The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

defendant filed objections. The district court adopted the magistrate judge's recommendation and denied defendant's motion, and plaintiff filed an amended complaint.

Thereafter, the magistrate judge appointed counsel to represent plaintiff, and defendant moved to dismiss the complaint for failure to exhaust administrative remedies. The magistrate judge recommended that the motion to dismiss be denied, and defendant filed objections. The district court adopted the magistrate judge's recommendation and denied defendant's motion to dismiss.

Following discovery, defendant again moved the district court for summary judgment, plaintiff responded in opposition, and defendant submitted a reply. The magistrate judge recommended that summary judgment for defendant be granted, and the district court granted plaintiff leave to file pro se objections after counsel declined to do so. The district court adopted the magistrate judge's recommendation and granted summary judgment for defendant. Plaintiff filed a timely notice of appeal pro se. On appeal, plaintiff contends that he established a genuine issue of material fact remaining for trial with respect to whether defendant retaliated against him in violation of the First Amendment. Defendant responds that the district court's judgment was proper.

Upon Denied. novo review, *see Brooks v. Am. Broad. Cos.*, 932 F.2d 495, 500 (6th Cir. 1991), we affirm the judgment of the district court. The plaintiff seeks punitive and compensatory damages and requests that "the misconduct charge [be] expunged from his file." J.A. at 14. Thus this case falls directly within the doctrine of *Heck v. Humphrey*, 512 U.S. 477 (1994), which this circuit applied to a prisoner seeking damages and expungement of a disciplinary infraction in *Huey v. Stine*, 230 F.3d 226, 228 (6th Cir. 2000). "In order to grant the plaintiff in this case the relief he seeks, we would have to unwind the judgment of the state agency." *Id.* at 230. Thus *Heck* bars the plaintiff's action under 42 U.S.C. § 1983.

Accordingly, the district court's judgment is affirmed. *See* Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Clerk

No. 02-1043

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHAKUR MUHAMMAD, also known as John E. Mease,	)	
Plaintiff-Appellant,	)	
v.	)	ORDER
MARK CLOSE, Correctional Officer,	)	
Defendant-Appellee	)	

Before: MARTIN, Chief Judge; MOORE, Circuit Judge; WISEMAN, District Judge.*

Shakur Muhammad petitions the court to rehear its September 23, 2002, order that affirmed a district court grant of summary judgment for defendant in this civil rights action filed under 42 U.S.C. § 1983.

Upon consideration, the panel concludes that it acted under no misapprehension of law or fact in issuing its order. See Fed. R. App. P. 40(a).

Accordingly, the petition for a rehearing is denied.

ENTERED BY ORDER OF THE COURT

Clerk

* The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

No. 02-9065

In the Supreme Court of the United States

Shakur Muhammad, aka John E. Mease,

Petitioner,

v

Mark Close,

Respondent.

CERTIFICATE OF SERVICE

Cynthia A. Aven, being first duly sworn, deposes and says that on May 12, 2003, she served three copies of the brief in opposition upon the following by enclosing same in a properly addressed envelope and depositing same in the United States mail in Lansing, Michigan:

Shakur Muhammad
#213302
1576 Bluewater Hwy
Ionia, MI 48846

All parties required to be served have been served.

Cynthia A. Aven

Subscribed and sworn to before me this
12th day of May, 2003.

Natalie D. Thelen, Notary Public
State of Michigan
County of Clinton, Acting in Ingham County
My commission expires: 12/08/05

RECE

MAY 19 2003

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SUPREME COURT U.S.

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